(22,974)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 144.

NORTH CAROLINA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. ZACHARY, ADMINISTRATOR OF HERBERT H. BURGESS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Print
Petition for writ of error	*a*	1
Allowance of writ of error	*b*	1
Assignment of errors	*c*	2
Writ of error	*g*	4
Citation and service	*i*	4
Bond on writ of error	*k*	5
Record from superior court of Guilford County, North Carolina	1	6
Summons and return	1	6
Complaint	4	7
Answer	9	10
Judgment	13	13
Verdict	14	14
Docket entries	15	14
Case on appeal	16	15
Testimony of James A. Zachary	17	15
Noble Price	18	16
Henry Price	26	21
James A. Zachary (recalled)	27	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1913.

	Original.	Print
Testimony of W. D. Burgess	28	22
A. J. Oliver	28	22
R. L. Ray	33	25
E. D. Dickerson	35	26
Plaintiff closes	39	29
Motion for nonsuit	39	29
Defendant's 1st exception	41	30
Motion for nonsuit overruled	41	30
Defendant's 2d exception	41	30
Right to open and close argument denied	41	30
Defendant's 3d exception	41	30
Requests to charge refused	41	30
Defendant's 4th exception	42	31
Requests to charge refused	42	31
Defendant's 5th exception	42	31
Requests to charge refused	42	31
Defendant's 6th exception	44	32
Requests to charge refused	44	32
Defendant's 7th exception	44	32
Request to charge refused	44	32
Defendant's 8th exception	44	32
Request to charge refused	44	32
Defendant's 9th exception	45	32
Request to charge refused	45	32
Defendant's 10th exception	45	33
Request to charge refused	45	33
Defendant's 11th exception	46	33
Request to charge refused	46	33
Defendant's 12th exception	47	34
Request to charge refused	47	34
Defendant's 13th exception	48	34
Request to charge refused	48	35
Defendant's 14th exception	49	35
Request to charge refused	49	35
Defendant's 15th exception	49	35
Request to charge refused	49	35
Defendant's 16th exception	50	35
Request to charge refused	50	35
Defendant's 17th exception	51	36
Request to charge refused	51	36
Defendant's 18th exception	51	36
Request to charge refused	51	36
Defendant's 19th exception	52	37
Request to charge refused	52	37
Defendant's 20th exception	53	37
Request to charge refused	53	37
Defendant's 21st exception	53	37
Request to charge refused	53	38
Defendant's 22d exception	54	38
Request to charge refused	54	38
Defendant's 23d exception	54	38
Charge to jury	54	38
Defendant's 24th exception	61	42
Charge to jury	61	42

	Original.	Print
Defendant's 25th exception	63	43
Charge to jury	63	43
Defendant's 26th exception	64	44
Charge to jury	64	44
Defendant's 27th exception	75	50
Charge to jury	75	50
Motion for nonsuit overruled	77	52
Defendant's 28th exception	77	52
Motion for new trial overruled	77	52
Defendant's 29th exception	77	52
Motion for new trial overruled	77	52
Defendant's 30th exception	77	52
Judgment and appeal	77	52
Defendant's 31st exception	77	52
Notice of appeal, &c	77	52
Assignments of error	78	52
Diagram	95a	62
Acceptance of service of case on appeal	95	63
Undertaking on appeal	95	63
Clerk's certificate	96	63
Docket entries	97	64
Opinion	98	64
Judgment	106	68
Clerk's certificate	107	68

a The Supreme Court of North Carolina.

JAMES A. ZACHARY, Administrator of Herbert H. Burgess, Plaintiff,
vs.
NORTH CAROLINA RAILROAD COMPANY, Defendant.

Petition for Writ of Error.

North Carolina Railroad Company, the above-named defendant, respectfully shows that on the 10th day of November, in the year 1911, the Supreme Court of North Carolina, which is the highest court in the State in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action in which Jas. A. Zachary, administrator of Herbert H. Burgess, was plaintiff, and your petitioner, North Carolina Railroad Company, was defendant.

In said action a right, privilege and immunity was duly and specially set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the right, title and immunity so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herein.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correct-
b ing of the errors complained of; that an order may be entered fixing the amount of a supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of North Carolina herein may be reversed and annulled.

WILSON & FERGUSON,
JOHN N. WILSON,
GARLAND S. FERGUSON, JR.,
JOHN K. GRAVES,
Attorneys for North Carolina Railroad Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by the North Carolina Railroad Company payable to Jas. A. Zachary, Administrator of Herbert H. Burgess, in the sum of Four thousand dollars ($4,000.00) such bond when approved to act as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

c Supreme Court of the State of North Carolina.

JAS. A. ZACHARY, Administrator of Herbert H. Burgess, Plaintiff,
vs.
NORTH CAROLINA RAILROAD COMPANY, Defendant.

Assignment of Errors for the Supreme Court of the United States.

This was a civil action instituted by the plaintiff, James A. Zachary, Administrator of Herbert H. Burgess, against North Carolina Railroad Company, defendant, to recover damages for the death of said intestate, alleged to have been caused by the negligence and wrongful acts of said defendant and its lessee, Southern Railway Company, at Selma, North Carolina, on April 29, 1909, while said Herbert H. Burgess, deceased, was employed by said Southern Railway Company in the capacity of locomotive fireman under contract for a valuable consideration, and was engaged in the discharge of his duties as such. The death of plaintiff's intestate was caused by his being struck by a switch engine of said Southern Railway Company, a common carrier by railroad engaged in commerce between the States, which said switch engine was being moved and operated by employés of said company through its yards for the purpose of coupling to and detaching certain cars from a train of said company consisting of said cars and certain other cars which had been brought from Spencer, North Carolina, and were to be transported in said train to Pinners Point, Virginia. Said Herbert H. Burgess was struck and killed while attempting to cross the track upon
d which said switch engine was moving, he having immediately prior to said accident been engaged in preparing a certain other engine of said Southern Railway Company, defendant's lessee as aforesaid, for its daily run or movement from Selma, North Carolina, to Spencer, North Carolina, on which run or movement said engine was to haul a train containing freight cars which had been brought by said Southern Railway Company from Pinners Point, Virginia, and was in transit to destination in North Carolina and other States.

There was neither allegation nor evidence that there were in existence at the time of said injury or death or at the time the action was instituted or at any time since a widow, children, parents of or next of kin dependent upon said intestate.

North Carolina Railroad Company, defendant in the court below and plaintiff in the Supreme Court of the United States, respectfully assigns as errors in the record and proceedings in this cause, in the Supreme Court of North Carolina, the following:

1. The Supreme Court of North Carolina erred in holding that the Act of Congress, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by Article I, Section 8, Clause 3, of the Constitution of the United States, the benefit and

protection of which said clause of the Constitution and said Act of Congress were duly set up and specially claimed in these proceedings, did not govern the rights and remedies of the defendant in error and the rights and liabilities of plaintiff in error, North Carolina Railroad Company, with respect to the matters and things out of which this action arose to the exclusion of the statute of the State under which the judgment was had; inasmuch as the record showed that Southern Railway Company, upon the alleged acts and defaults of which the action was based and for which said alleged acts and defaults the judgment was rendered, was, at the time of
e the injury and death of plaintiff's intestate, a common carrier by railroad engaged in commerce between the States, and that plaintiff's intestate was, at the time of said injury, employed by said Southern Railway Company in such interstate commerce.

2. Said Court erred in holding that the North Carolina statute giving a right of action for wrongful death was applicable to the matters and things upon which this action was based, notwithstanding said Act of Congress of April 22, 1908, the benefit and protection of which were duly and specially claimed.

3. Said Court erred in denying plaintiff in error, North Carolina Railroad Company, the right, privilege, and immunity of being governed in respect to said injury and death and of having its liability therefor determined solely by the provisions of said Act of Congress, approved April 22, 1908, and thus erred in denying said plaintiff in error rights, privileges and immunities granted to it by said Act of Congress, which said rights, privileges, and immunities were duly set up and specially claimed in these proceedings.

4. Said Court erred in affirming the judgment of the lower court and in so doing denied plaintiff in error the benefit and protection of said Act of Congress, approved April 22, 1908, in that the record contained neither allegation nor evidence of the existence of any beneficiary or beneficiaries designated in said Act of Congress, in the absence of which said allegations and evidence as to the existence of such beneficiaries there could lawfully be no judgment against plaintiff in error based on the matters and things complained of in this action.

5. Said Court, therefore, erred in rendering the final judgment it did render against the plaintiff in error, and which is complained of in this case.

Wherefore, for these and other manifest errors appearing in
f the record, said North Carolina Railroad Company, plaintiff in error, prays that the judgment of said Supreme Court of North Carolina be reversed, set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting its rights under the Constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

WILSON AND FERGUSON,
JOHN N. WILSON,
GARLAND S. FERGUSON, JR.,
JOHN K. GRAVES,
Attorneys for North Carolina Railroad Company.

g *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court, before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Jas. A. Zachary, Administrator of Herbert H. Burgess, and the North Carolina Railroad Company, a corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute, of the United States, and the decision was against the right, privilege, or immunity specially set up or claimed under such clause of the said Constitution and such statute, a manifest error hath happened, to the great damage of the said North Carolina Railroad Company, as by its complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, D. C., within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

h Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 29th day of November, in the year of our Lord One Thousand, Nine Hundred and Eleven.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk Circuit Court of the United States,
Eastern District of North Carolina.
By GEO. L. TONNOFFSKI, *D. C.*

Allowed:
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

i *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Jas. A. Zachary, Administrator of Herbert H. Burgess, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D.

C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of North Carolina, wherein North Carolina Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of North Carolina, this 29 day of November, 1911.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

Attest:
THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

I, an attorney of Record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

——— ———,
Attorney for Defendant in Error.

(Service noted on cover.)

j [Endorsed:] Fee 60c. Paid by G. S. Fergerson, Jr. Served by delivering a copy of the within citation to Jno. A. Barringer, attorney for the plaintiff. This Dec. 4th, 1911. B. E. Jones, Sheriff of Guilford County, N. C., By G. P. Crutchfield, D. S.

k In the Supreme Court of North Carolina.

NORTH CAROLINA RAILROAD COMPANY, Plaintiff in Error,
vs.
JAS. A. ZACHARY, Administrator of Herbert H. Burgess, Defendant in Error.

Bond.

Know All Men by These Presents, that we, North Carolina Railroad Company, a corporation of the State of North Carolina, as Principal, and Illinois Surety Company, a corporation of the State of Illinois, as Surety, are held and firmly bound unto Jas. A. Zachary, Administrator of Herbert H. Burgess, in the full and just sum of four thousand dollars ($4,000.00) for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves, and each of our successors, firmly by these presents.

Sealed with our seals and dated this — day of November, in the year 1911.

Whereas, lately at a hearing before the Supreme Court of North Carolina, in a suit depending in said Court between the said Jas. A.

Zachary, Administrator of Herbert H. Burgess, as plaintiff, and said North Carolina Railroad Company, as defendant, a final judgment was rendered against said North Carolina Railroad Company, and North Carolina Railroad Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment:

Now Therefore, the condition of this obligation is such that if the said North Carolina Railroad Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal of North Carolina Railroad Company.]

NORTH CAROLINA RAILROAD COMPANY,
(S.) By BENNAHAN CAMERON, *President.*

Attest:
(S.) A. H. ELLER, *Secretary.*

ILLINOIS SURETY COMPANY,
(S.) By A. A. ANDREWS, JR., *Attorney.*

Bond approved, and to operate as a supersedeas.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

1-3 NORTH CAROLINA,
Guilford County:

In the Superior Court.

Be It Remembered, That on the 18th day of June, 1909, Jas. A. Zachary, administrator of Herbert H. Burgess, deceased, sued out of the Superior Court of said county a summons in the following words and figures, to-wit:

Summons for Relief.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court.

JAS. A. ZACHARY, Administrator of Herbert H. Burgess, Plaintiff,
VS.
THE NORTH CAROLINA RAILROAD COMPANY, Defendant.

State of North Carolina to the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon the North Carolina Railroad Company, the defendant above named, if it be found within

your county, to be and appear before the Judge of our Superior Court to be held for the County of Guilford at the court house in Greensboro, on the 23rd day of August, 1909, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if it fail to answer the said complaint within the time required by law, the plaintiff
4 will apply to the Court for the relief demanded in the complaint and the cost of this action to be taxed by the Clerk.

Herein fail not, and of this summons make due return.

Given under my hand and seal of said Court this 18th day of June, 1909.

ERNEST CLAPP,
Clerk Superior Court, Guilford County,
By W. P. BEALL, JR., *D. C.*

Endorsed on the back as follows:

Received June 18, 1909. Served June 18, 1909, by reading the within to and delivering a copy to W. B. Devlin, Agent Sou. Ry. Co.

B. E. JONES,
Sheriff Guilford County,
By G. P. CRUTCHFIELD, *D. S.*

On the 16th day of August, 1909, the plaintiff filed in the office of the Clerk of the Superior Court of Guilford County a complaint in the following words and figures, to-wit:

Complaint.

NORTH CAROLINA,
Guilford County:

In the Superior Court, August Term, 1909.

JAMES A. ZACHARY, Administrator of Herbert H. Burgess,
vs.
THE NORTH CAROLINA RAILROAD COMPANY.

The plaintiff complaining of the defendant, alleges:

5 1.

That Herbert H. Burgess is dead and that the plaintiff James A. Zachary duly qualified as administrator on the estate of said intestate before the Clerk of the Superior Court of the County of Guilford before the institution of this action and at once entered upon his duties as such administrator.

2.

That the defendant, The North Carolina Railroad Company is a corporation duly created, organized and existing under and by virtue of the laws of the State of North Carolina as a railroad company, and

on the 29th day of April, 1909, as well as prior and subsequent thereto, was the owner of a railroad from Charlotte through Selma to Goldsboro in the State of North Carolina with all the powers and privileges of a railroad company.

3.

That the Southern Railway Company is a corporation duly created, organized and existing under and by virtue of the laws of the State of Virginia and that on said date, as well as prior and subsequent thereto, was operating the said railroad under and by virtue of the terms of a certain lease or contract made and entered into by said Southern Railway Company with the defendant, The North Carolina Railroad Company.

4.

That in the prosecution and operation of its said business on said date, the defendant and its said lessee had established and were maintaining a number of side tracks on its premises or right of way at and in the town of Selma, N. C., known as the switchyards
6 at the point of intersection where defendant's road-bed or track crosses the road-bed or track of the Atlantic Coast Line Railway Company, and where on said date were fixed and located the terminals of the crews and engines of the said lessee's freight trains operating on the line of the said railroad between Spencer, N. C., and Selma, N. C., and also between Pinner's Point, Va., and Selma, N. C.

5.

That on the 29th day of April, 1909, plaintiff's intestate was in the employment of the lessee of the defendant in the capacity of fireman under contract for a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862 in charge of Engineer Cyrus Lawson; that about eight o'clock p. m., on the date aforesaid, said intestate, after inspecting, oiling, firing and preparing his said engine which was standing on a side track on the east side of the main line for starting on its return trip to Spencer, N. C., attempted to cross the main line or track and intervening tracks which were between his said engine and his boarding house located on the west side and a few steps from the main track; that at the time of his attempting to cross said tracks to reach his boarding house, there was another engine, No. 716, standing on a side track east of the main track between said main track and his said engine No. 862 as aforesaid, within seven feet of said main track and in such close proximity to the main track and in such position as to shut off the view of the main track from said intestate; that this said engine No. 716 had its blower on and was making a noise so loud at the time of said intestate's crossing in its rear the track on which it was standing, that

intestate could neither see nor hear another engine, No. 1551, which
was the shifting engine used on said yards and which at the
7 time was running backward with tender in front along the
main line and southward from the water tank at a reckless and dangerous rate of speed, without headlight, and without an adequate and competent crew; that just as said intestate emerged or stepped from the track in the rear of engine No. 716, and attempted to step upon the edge of the main line in an attempt to cross it, he was suddenly and violently struck and knocked down by the said shifting engine on said main track and so crushed, mangled, mashed and injured that he died almost instantly.

6.

That defendant company and its lessee owed the plaintiff's intestate the duty of providing and equipping said shifting engine with proper and sufficient and competent crew, with proper display signals, and with proper headlights at said hour of the evening after sunset when it was so dark as to require headlights, and with a brakeman on front of tender of said engine and the further duty of observing the track and keeping a reasonable lookout at said dangerous place and of exercising reasonable care to provide for the safety of those engaged and compelled to work on the said yard which they, the defendant and its lessee, failed to do and discharge on that evening; that by reason of the negligent breach of said duties, plaintiff's intestate was killed by the negligence of defendant at the time and place aforesaid and in the way and manner hereinbefore set forth.

7.

That in the operation of said shifting engine at the time and place aforesaid and in the way and manner aforesaid, the defendant and its lessee were wilfully, recklessly and wantonly negligent:

8 *a.* In that defendant was running said shifting engine in night time or after sunset at a reckless and dangerous rate of speed at a dangerous place and without the display of the proper signals.

b. In that there was not an adequate and competent crew in charge of said shifting engine.

c. In that the engineer in charge of said shifting engine was reckless and careless and incompetent and failed to ring his engine bell and to sound his whistle as required by the rules of the defendant company.

d. In that defendant did not have a brakeman on front end of the tender of said engine;

e. In that the tender of said engine was not furnished or equipped with headlight on front end so as to enable said intestate to foresee his danger;

f. In that defendant failed to exercise proper vigilance and reasonable care in observing the track and in keeping proper lookout.

g. In that defendant placed and kept another engine on adjoining track in such close proximity to main track as to make it impossible for said intestate to see the approach of the said moving engine;

h. In that defendant permitted the engine No. 716 on adjoining track to keep its blower on and make such a noise as to prevent intestate from hearing the approach of said shifting engine.

i. And in that defendant company and its said lessee failed to exercise reasonable care to provide for the safety of those engaged and compelled to do work on said switchyard.

8.

That without fault on his part, the plaintiff's intestate was killed by the negligence of defendant in the way and manner here-
9 inbefore described and that plaintiff was thereby endamaged in the sum of twenty-five thousand ($25,000.00) dollars.

Wherefore, the plaintiff demands judgment against the defendant for the sum of twenty-five thousand ($25,000.00) dollars and the cost of this action to be taxed by the Clerk.

G. S. BRADSHAW,
JOHN A. BARRINGER,
Attorneys for Plaintiff.

James A. Zachary, being first duly sworn, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except such as are stated on information and belief, and that as to these, he believes it to be true.

JAS. A. ZACHARY.

Subscribed and sworn to before me this the 14th day of August, 1909.

[SEAL.] R. W. HARRISON, *N. P.*

My commission expires Feb'y 17, 1910.

On the 23rd day of January, 1911, the defendant filed in the office of the Clerk of the Superior Court of Guilford County, an answer in the following words and figures, to-wit:

Answer.

NORTH CAROLINA,
Guilford County:

In the Superior Court, January Term, 1911.

JAS. A. ZACHARY, Administrator of Herbert H. Burgess,
vs.
NORTH CAROLINA RAILROAD COMPANY.

The defendant answering the plaintiff's complaint, says:

10 I.

That in answer to the allegations contained in article one of said complaint it is admitted, on information and belief, that Herbert H. Burgess is dead, but it is, on information and belief, denied that the plaintiff Jas. A. Zachary, duly qualified as administrator on the estate of said intestate, and it is, on information and belief, denied that the said plaintiff Jas. A. Zachary is the legally and duly qualified administrator of said Herbert H. Burgess, deceased, and all allegations of said articles not herein admitted, are denied.

II.

The allegations of article two of the complaint are admitted.

III.

The allegations of article three of the complaint are admitted.

IV.

The allegations of article four of the complaint are, on information and belief, admitted.

V.

In answer to the allegations contained in the fifth article of the complaint, the defendant, on information and belief, admits that on the 29th day of April, 1909, plaintiff's intestate was in the employment of the lessee of the defendant in the capacity of fireman under contract for a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862 in charge of Engineer Cyrus Lawson. All
11 other allegations contained in said article five of the complaint are, on information and belief, denied, and the defendant avers that said engine No. 862 was to haul train No. 171 from Selma, North Carolina, to Spencer, North Carolina, which said

train was carrying interstate commerce, and which said train was engaged in interstate commerce; and the defendant further alleges that about 8 o'clock on the date aforesaid the said fireman was inspecting, oiling and firing his engine which was standing on the side track on the east side of the main line preparatory to starting on its return trip to Spencer, North Carolina, and was engaged in interstate commerce and was engaged in transporting and preparing to transport freight moving from the State of Virginia to the State of North Carolina and to other states.

VI.

That the allegations contained in article six of the complaint, are, on information and belief, denied.

VII.

That the allegations contained in article seven and the several sub-sections thereof are, on information and belief, denied.

VIII.

That the allegations contained in article eight of the complaint are, on information and belief, denied.

And for a further defence the defendant says:

1. That, as it is informed and believes, the plaintiff's intestate on the 29th day of April, 1909, at the time he was injured, was engaged in interstate commerce being an employee on a train of the defendant's lessee, which was moving from Selma, North Carolina, to Spencer, North Carolina, and was carrying cars loaded
12 with commerce and engaged in transporting and preparing to transport said commerce and freight from the State of Virginia to the State of North Carolina and other States; that while engaged in such interstate commerce the liability of the defendant company to him, or to the plaintiff as his representative, is fixed and regulated by the terms of an Act of the Congress of the United States entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," and approved April 22nd, 1908.

Under and by virtue of said Act the plaintiff is not entitled to recover in this action, and the defendant specially pleads said Act in bar of any recovery herein.

2. That on the 29th day of April, 1909, the plaintiff's intestate was a fireman in the employment of the defendant's lessee and was a member of the crew of engine 719, which was standing upon the side track at Selma, North Carolina, and the said plaintiff's intestate, without observing the care and caution that a prudent man would have observed under the circumstances, negligently and carelessly stepped out from behind said engine 719 immediately in front of another engine which was moving on a parallel track, and was

struck by the said engine and killed, and such negligence on the part of the plaintiff's intestate contributed to and was the proximate cause of his injury and death.

3. That the plaintiff's intestate negligently and carelessly, without observing the care and caution that a prudent man would have observed under the circumstances, without stopping, looking and listening for the approach of a train, stepped upon the track of the defendant's lessee immediately in front of an approaching engine, and such negligence on his part contributed to and was the proximate cause of his injury and death.

4. That if the plaintiff's intestate had exercised care, caution and prudence on said occasion, he could have heard or seen the
13 approaching engine before he stepped upon the track, and the failure to observe such care and caution on his part was contributory negligence and contributed to and was the proximate cause of his injury and death.

Wherefore, defendant having fully answered, prays that the plaintiff's action be dismissed, that the defendant go hence without day and recover of the plaintiff the costs of this action to be taxed by the Clerk.

WM. B. RODMAN,
WILSON AND FERGUSON,
Attorneys for Defendant.

A. H. Eller, being duly sworn, says: That he is secretary of the North Carolina Railroad Company, the defendant in the above entitled action, and that he has read the foregoing answer and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those he believes it to be true.

A. H. ELLER.

Sworn to and subscribed before me this the 14th day of January, 1911.

R. H. MONEY,
Notary Public.

My commission expires December 9, 1912.

Judgment.

NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1911.

JAS. A. ZACHARY, Administrator of Herbert H. Burgess, Deceased,
vs.
NORTH CAROLINA RAILROAD COMPANY.

14 This cause coming on to be tried before Hon. F. A. Daniels, judge presiding, and a jury, and the jury having returned for their verdict the following:

"Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint?"

Answer: "Yes."

"Did the intestate contribute to his death by his own negligence?"

Answer: "No."

"What amount, if any, is plaintiff entitled to recover?"

Answer: "$2,000.00."

It is, therefore, on motion, considered, ordered and adjudged and decreed by the court that the plaintiff, Jas. A. Zachary, administrator of Herbert H. Burgess, deceased, do recover of the defendant, the North Carolina Railroad Company two thousand dollars ($2,000) with interest until paid and the costs of this action to be taxed by the Clerk.

(S.) F. A. DANIELS,
Judge Presiding.

Verdict.

At February Term, 1911, of the Superior Court of Guilford county, the following proceedings were had, to-wit:

JAS. A. ZACHARY, Adm'r H. H. Burgess,
vs.
NORTH CAROLINA RAILROAD COMPANY.

In this case the following jury are sworn and empanelled,
15 to-wit: Julius H. Apple, Syd Greeson, O. W. Hines, J. C. Foust, J. L. Neece, C. F. Loman, P. D. Simpson, J. A. Short, R. A. Lea, J. W. Moorefield, W. W. Hayworth and B. F. Stack, who in answer to the issues submitted them return the following:

1. Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint?

Answer: "Yes."

2. Did the intestate of the plaintiff contribute to his death by his own negligence?

Answer: "No."

3. What amount, if any, is the plaintiff entitled to recover?

Answer: "$2,000.00."

Docket Entries, February Term, 1911.

The jury returned a verdict in favor of the plaintiff.

Defendant moves for judgment notwithstanding the verdict. Motion overruled. Exception.

Motion for new trial. Motion overruled. Exception.

Judgment. Exception.

Appeal to the Supreme Court.

Notice of appeal given in open court. Notice waived.

Appeal bond fixed in the sum of $50.00.

45 days allowed defendant to make up and serve case on appeal, and 45 days thereafter allowed plaintiff to file exceptions or counter-case.

16 Case on Appeal.

NORTH CAROLINA,
Guilford County:

JAMES A. ZACHARY, Administrator of Herbert H. Burgess, Deceased,
vs.
NORTH CAROLINA RAILROAD COMPANY.

This was a civil action, tried before his Honor, F. A. Daniels, and a jury, at the February Term, 1911, of the Superior Court of Guilford County.

From a verdict for the plaintiff for two thousand dollars ($2,000.00) the defendant appealed.

Summons was issued out of the Superior Court of Guilford County on June 18th, 1909, and a copy of the same is hereto attached, and made a part of the case on appeal. The same was returnable to the August Term, 1909, of the Superior Court of Guilford County.

At the August Term, 1909, of the Superior Court of Guilford County, the plaintiff filed his complaint, which appears in the record and is referred to and made a part of this case on appeal.

At the August Term, 1909, of the Superior Court of Guilford County, the defendant filed a written motion to compel plaintiff to make his complaint more definite and certain, a copy of which appears in the record, and is made a part of the case on appeal.

The cause was from time to time continued, pending the hearing of the aforesaid motion, until the — Term, 1909, of the Superior Court of Guilford County, and at the — Term, 1910, of the Superior Court of Guilford County, the motion of the defendant company to compel plaintiff to make his complaint more specific, was overruled.

17 Thereupon the defendant, at the January Term, 1911, filed its answer, which appears in the record, and which is referred to and made a part of this case on appeal.

The cause came on for hearing at the February Term, 1911, of the Superior Court of Guilford County and the plaintiff offered evidence as follows:

JAMES A. ZACHARY, the plaintiff, being first duly sworn, testified as follows:

"I know Herbert H. Burgess. He is dead. He died April 29th, 1909. I have the letters of administration, which were issued to me as administrator upon his estate. The said letters were offered in evidence and are marked Exhibit A, attached hereto. I am the same James A. Zachary who took out these letters of administration, and I am the administrator of Herbert H. Burgess. I had known him all his life. His character was good. He was considered an industrious hard-working boy. I never heard of his being drunk in my life, or of his using intoxicants in any way. According to the family record, he was 27 years, ten months and thirteen days old at the time of his death."

Upon cross-examination witness said:

"I live at Burlington. Mr. Burgess had been domiciled in Greensboro, according to my best information, going on three years. Ramseur, or near there, was the home of his people. He was working for the Southern Railway Company and boarding here in Greensboro and made his home in Greensboro."

Upon re-direct examination he said:

"H. H. Burgess had been living in Greensboro two years and a little over three months at the time of his death. Greensboro was his domicile and had been for a little over three years.

18 NOBLE PRICE, a witness for plaintiff, testified as follows:

"I lived at Selma when Mr. Burgess was killed. I now live out in the country near Selma and about fourteen miles from Raleigh. I did not know Herbert H. Burgess. I know the night they said Mr. Burgess was killed. I did not know that it was Mr. Burgess, and I could not so state. I was standing on the front end of switch engine No. 1551—the one that killed him, I guess. I was standing on switch engine No. 1551—the one they said killed Mr. Burgess—or kill one man; I do not know who it was. He was the man spoken of here. I was on front end of engine—I mean where they have the headlight; I mean the engine and not the tender. I was on the engine where the cow-catcher is placed on steps. The engine was running backwards, going east, with the tender in front. If it had any headlight on tender, or any light of any sort, I do not remember about it. They did not have any headlight on end of tender when I stepped away from the back end, which was about two minutes before the accident. I stepped from the back end of the tender to the front end of the engine. That was before the man was killed, and while the engine and tender was standing at the freight depot, and about two minutes or somewhere along that, as near as I can come to it, before the man was killed. There was no man on the end of the tender, so far as I know anything of. The engineer was in his place, I reckon, on the side of the cab. I don't remember whether it was dark or not. I had my lantern lit to give signals. I lit my lantern to give signals with. I always light it when night comes when the time comes to light it; it was a signal lantern that I had in my hand. I could not tell you exactly how fast the engine was going at the time this man was killed, but I guess between 15 and 20 miles an hour. There are six tracks at this place. Nearly all of them run west—all but the cinder
19. track; that runs both ways. The switch engine on which I was riding was on the main line—the one they call the main line.

"When this switch engine struck this man, I can not tell exactly how far the engine was from the switch of the main line—something like one hundred yards, or one hundred feet or something like that. there was another engine standing near the switch engine, when it struck this man. The engine that was standing near the switch engine when it struck this man was engine No. 719 and it was standing just in the clear of the main line. There is a post there, too,

to indicate the clear, and I think the engine was standing right against it. This engine, 719, that was standing near where switch engine struck this man was one of the big freight engines. It had a blower on and was making a noise. I could not tell you exactly the character of the noise, but it was pretty loud. There was another engine, No. 862, standing over there. This engine No. 862 was between 10 and 15 feet from the freight engine No. 719. Most of the tracks there run west with the siding. They run east and west. The engine No. 862 was on the first track on that west side; next to it was the big freight engine No. 719, which was standing on the warehouse track, which is the second track and the switch engine, which I was on and which hit the man was running on the third track, which is the main line. The switch engine was backing east. The switch engine, when it struck this man was standing cross ways, about like that (indicating an angle). It was side ways. I reckon the end of the tender next to the big freight engine—the end of the tender of the switch engine on which I was riding, was something like about two feet from the big freight engine No. 719, standing there. The other engine that I have described as standing on the outer track—engine No. 862—was standing kind of north from the rest of them and about 15 feet, right over that way—north from them—10 or 15 feet I said.

"Referring to the angle of the switch engine and the big freight engine No. 719, they were not exactly parallel. Standing more down about the tender's length down below. they were at an angle to each other. The switch engine on which I was riding was going east. When it got to a certain point adjoining the freight engine No. 719, standing there, the other engine, that is No. 862, was standing kind of in the way we were going, so that the engine standing on the other line would be somewhat ahead of the two engines that would be closed. The outer engine would be somewhat behind the other, because they were all headed west. All of these engines were headed west."

This question was asked witness:

Q. State whether or not that big freight engine standing there—a man on this engine, coming from this engine toward this big engine was, whether his view would be obscured or not as to your engine coming in that direction?

A. I don't think it would.

Q. Would it not have gotten up between him an[illegible]

A. Yes.

Q. You say that the big freight engine would be between your engine coming, and the one that was standing there?

A. Sure—yes, sir.

The man that was killed came around behind the tender of the engine that was standing there—the big freight engine No. 719. This big freight engine was headed west, and the man came behind this big engine, and that big engine would, if he was behind, obscure the switch engine coming his way. I mean that he could

not see the switch engine coming if he was behind the big freight engine. The water tank and the water tank works were standing between the depot and the big freight engine. The water
21 tank was west of the freight engine. Our shifting engine had passed the water tank. It had passed it when it got to where this big freight engine was standing. I pulled the man who was killed out from under the engine. He seemed to be broke up pretty bad—his chest and his arms—when I pulled him out; he was lying across the rail, across the "T" iron, opposite the freight engine standing there. The shifting engine was in a hurry that night. We were in a little hurry on account of train No. 22, which was a mail train, running from Spencer or Salisbury—somewhere from up in that direction. I don't know where it starts from, and it was due there about that time. We had started with the shifting engine, to remove two cars off ahead of No. 72, before train No. 22 got there. Train No. 72 was standing on track No. 3 at the old yard. When the engineer started the shifting engine from up near the freight depot, I did not see him start it, as I was standing on the opposite or fireman's side. I saw the whole engine at the time he undertook to start it; I felt the movement of the wheels and when he put on the power, the wheels slid. I mean by that that the engineer pulled the engine open a little bit more than the wheels would stand and the wheels slid on it. He did not put the whole power on, but he put more power on that it could stand without sliding. That was just as we started—just as we left the depot.

On cross-examination this witness said:

At the time of this accident, I was the yard switchman on the Selma yards. Arthur Oliver was running the switch engine at the time of the accident. He was extra man there on the yard, running extra—extra hostler and extra engineer on switch engine. The duties of the hostler were to clean cars up, put sand on them, coal them, put in water, turn them around and keep steam on them. These were his duties. I was at Selma at the time of the accident. Selma is on the main line down there. It is on main line
22 that runs in the direction of Goldsboro up toward Greensboro, and near where this man was killed, the main line runs something like an easterly and westerly direction, that is from easterly direction to westerly direction or something like that. This rough sketch, which is attached, marked "B" is about right. The one marked main line on sketch would represent the main line. The water tank, as it would be about where it is marked down, in that direction and the freight warehouse in that direction. Going from the warehouse in an easterly direction, passing the water tank, you come to a switch which leads off into what is known as the warehouse track, and that is represented on the rough sketch shown witness on the northern side of the water tank.

The round mark on the rough sketch is the water tank. From the warehouse track or switch that goes off, going back towards Goldsboro, that is known as the cinder pit track. Then there is another track that leads off from the cinder pit track that is known

as the track for cleaning fires. That is, all the tracks on the northern side of the main line. On the southern side of the main line, starting from the warehouse, passing the switch that goes off to the warehouse track, going still further to the east, there is a switch that comes off on the southern side and then there are switches that come off from them. There were cars standing on the southern track, on the southern side. The cars were on No. 1 and double on No. 3. This big freight engine No. 719 about which I have spoken on direct examination, was standing at clear post on warehouse track. I can not say what the distance is between the warehouse track and the main line track at the clear post, as I never measured it. I don't think it is as much as 12 or 14 feet. I think it is about eighteen feet from track to track.

This big freight engine No. 719 was standing there perfectly still and so far as I know, no one on it. It was a large freight engine. Engine No. 862 was not standing on same track.
23 That was on the cinder pit track and this cinder pit track is about 15 feet from the main line, according to my best recollection; ten or fifteen feet, to my best recollection. Mr. Lawson, according to my recollection, was engineer on No. 862 and was on the engine at the time. I did not see him there, as I recall, and I don't know whether he was there or not, but I think he was. Engine No. 862 was not standing so as to be exactly opposite No. 719, but was standing so as to be a little down to the east. It was standing so that the engine of No. 862 would be about even with the rear end of the tender of engine 719, and that threw the tender of engine No. 862 to the east or toward Goldsboro, from engine No. 719. Our switch engine was standing out to the westward, at the freight depot. I was on the engine. I got on the engine at the freight depot. I got off the rear of the engine and waited until the engine passed me, and then I got on front end, that is, I was at the tender end of the switch engine, and waited until switch engine passed by me, and then got on front end of switch engine. I got up on fireman's side. Mr. Oliver was the engineer. He was extra hostler and extra engineer. The line of promotion is that a man must first become fireman, then hostler and extra hostler and from that he becomes engineer. An extra man is simply one who takes the place of others when they are unable to come. That is what I mean by an extra man. Mr. Oliver was here on yard, taking the place of the other men—either the place of the hostler or engineer, when either of the men were unable to perform their duties by reason of sickness or otherwise. Our switch engine was backing down the main line for the purpose of cutting two cars off front end of train No. 72. Train No. 72 is what is known as Pinners Point train, from Selma to Goldsboro. It is a train that has through cars. It comes from Spencer, stops at Selma, changes engines, and goes on with that changed engine to Pinners Point in the
24 State of Virginia. Our switch engine was going down there, backing down there for the purpose of taking Selma and Goldsboro cars out of that train. We were going down there to work this Pinners Point train. Engine No. 862 was standing over on

cinder pit track, being prepared to haul a train from there to Greensboro. This train that was being prepared to haul, was the train made up at Selma out of cars which came in from Pinners Point, Va., and would stop at Selma and be made up into a new train, and would include those cars which had come in from Pinners Point and other places, and this engine was standing there being prepared to haul that freight train on to Greensboro and its destination. The cars would come from Pinners Point in the State of Virginia and our switch engine was making it up. We were helping to make it up, and according to my best recollection, it had cars in it which came from Pinners Point, in Virginia, and were going through to Greensboro and other points, and I could not tell you whether the cars were to go on through to Atlanta, Lynchburg and Memphis or not, as I did not see the switch bill.

Mr. Lawson was the engineer on that train and was getting ready to go out. I can not tell you the name of the man who was killed, but the man who was killed was fireman on train and they (he and the engineer) were at that time getting engine ready to go out. I was riding on this switch engine on the front end, while it was moving backwards; the bell was ringing. When the switch engine got down opposite engine No. 719, it stopped, that is, it stopped after it had passed by a little. The tender of switch engine had passed by it. I can not say whether the engine of 1551 had passed the tender of 719 or not, because I was not on that side. I could not say whether the switch engine, when it stopped, was not standing so that the switch engine would be opposite No. 862, and the engine of switch engine opposite the tender of engine No. 719 or not, because I got off on the opposite side. That man that was hurt was lying up between the tender and the engine—switch engine—near the back driving wheel. He was on the south rail, that is, on the rail furthest from engine 719. His head was on the outside of rail, his feet in between tracks.

I could not say where the man was when he was hit. I never saw him until after he was run over. All I know about it was when I pulled him out and the way he was lying. I never saw him when he was hit. I don't know whether he was standing up facing the engine or not. I don't know which way he was going. It may be that he jumped right straight off the other engine. I don't know.

I don't know what time the sun set, or how dark it was or anything about that. I had my lantern lit to give signals. I don't always light my lantern immediately after sun down. I always light it immediately after the mail train passes. I lit my lantern before the mail train passed, because we were doing some work before the mail train, because we had a flag out protecting the mail train against us.

I don't know how far you could see the engine at that time. I never noticed. I would not say you could see it 300 or 400 yards, coming down straight track. I don't know how far you could see the man. I would not undertake to say. After the switch engine stopped, I got to the man first. As soon as I pulled him out from under the switch engine, I ran back and got the conductor and Mr.

Bob Strong, the yard master, and told them a man had been killed, and asked me who it was, and I said, "the switch fireman." Mr. Oliver was on the engine, and if he got down, I never saw him. Grant Watson was fireman and he jumped off as engine hit the man. He was standing on No. 3 track. I don't remember whether he went down to where man was after I pulled him out or
26 not. I did not get down from the switch engine until it stopped. The engineer reversed his engine and threw his brakes on in emergency. I did not know at the time what he saw ahead of him. I did not know what was the matter at all. As soon as the engineer did that and engine came to a standstill, I got down. In fact, I got down just before it came to a standstill. I could not say how far switch engine ran after brakes were put on.

On re-direct examination, witness said:

I said bell was ringing. I think the noise killed the sound of the bell some, where the man was killed, the noise of the standing freight engine 719. I do not know how far the switch engine went beyond the big freight engine, standing by. I don't remember and I have no impression. I said, in answer to Mr. Rodman's question, that I did not know how far it went. In answer to Mr. Rodman's question about using a lantern to see Mr. Burgess, he never asked me anything about that, and I did not say anything about it. He did not ask me anything about it, and did not tell him anything about it. I know when I passed him I saw him from the reflection of my light. That was the only way I had to see him. He was under the engine.

On re-cross examination, witness said:

I was not on rear of the tender of big freight engine. I am simply giving my impression as to what the noise might have done, when I said it might have killed the noise of the bell. I had my lantern when I got back there, and the man was lying partly in and partly out from under the train.

HENRY PRICE, witness for plaintiff, testified as follows:

I live at Selma. I was at Selma on the night of April 29th, 1909, when Mr. Burgess is said to have been killed. I was down
27 on the crossing, which is about 300 feet from the depot water tank. I saw the switch engine that night. I saw it as it was coming on down from toward the coal chute, which is west of the depot. As near as I can come to it, this was about ten minutes before the man was killed. It then had no light on the end of the tender that was moving forward, and as near as I can come to it, it was running between 15 and 20 miles an hour. There was no flagman on the end of the tender that was moving forward. I do not know where the flagman was or where the switchman was. At that time it was dark. I went up to the freight depot and saw the man that had been killed. They said it was Herbert W. Burgess. He was dead at that time. This was about ten minutes after the accident—as near as I can come to it. I did not know the man.

I did not see the big freight engine standing on track and I do not know anything about that.

On cross-examination, witness said:

I was on crossing, which is about 300 yards west of freight depot. I did not see the engine standing at the freight depot. I saw it when it passed me. I just was about five or six steps from the main line when it passed me. All that I know about the matter is that the engine passed me when I was about 300 feet west of the freight depot, and that it was going toward Goldsboro, and it had no headlight on the rear end, that is, the end that was going forward, and in about ten minutes after that I saw a man in freight depot, who was dead, and somebody said he was Mr. Burgess.

JAMES A. ZACHARY, the plaintiff, recalled, says:

I had a conversation with Mr. Oliver, engineer, who was on this train that killed Mr. Burgess. This conversation took place after the accident. I guess it was something like ten days after the accident, but I cannot give the exact date. Mr. Oliver was the
28 engineer on the train. I have a blue print of the situation down there. This is the blue print.

Upon cross-examination, witness said:

This blue print was made from a pencil sketch that witness himself drew. The blue print is according to pencil sketch that witness made. Witness was not down there at the time of the accident. Witness went there after the accident and drew a pencil sketch from a location as given to him by the engineer, Mr. Oliver.

Upon objection by defendant the blue print was ruled out.

W. D. BURGESS, witness for plaintiff, testified:

I am an uncle of Herbert H. Burgess, deceased. I had known deceased all of his life. He was what I would call a mighty good child, boy and young man. Had been good all his life and was very industrious. I never knew him to drink anything in his life, and if he ever drank anything, I never knew it.

Upon cross-examination, witness testified:

I am an uncle of Herbert H. Burgess. I live at High Point.

A. J. OLIVER, witness for plaintiff, testified as follows:

I live at Selma. I am now working for the Southern Railway Company. I worked as extra around there part of the time, as hostler part of the time, in running switch engines. On April 29th, 1909, I was running switch engine doing the same work then as I am now. My duties in that position on April 29th, 1909, were to make up trains for the north and west. On the evening of April 29th, 1909, I was running and operating switch engine 1551. I remember the occasion of this accident. I did not know Mr.
29 Burgess personally. I just knew him by sight. I had heard him called Burgess and I had seen him around there

four, five or six months. He had been running there three or four months—something like that. I did not see Mr. Burgess on the evening of the accident—until after he was dead, until he stepped up on track. He stepped up on track as I was coming down the main line, backing down the main line. I saw him then. He was coming from the north side of the track. He came around the engine No. 719, the big freight engine. I saw him after he came by the corner of tank. I saw him after he came around engine 719. When I first saw him, he was walking sideways, with his head stuck down, walking very rapidly, like he was in a hurry. He was not coming toward me, but was walking sideways from me. He was attempting to cross the main track. He made one step after I saw him around between the track and the next one was up on the track; that is, he made one step outside the rail, and the next inside. When I first saw him, he was not in the act of stepping over the rail on the side next to me; he was going south. I know where his boarding house was, and he was going in that direction. I saw him about a second before the tender hit him.

Q. How far was your tender—the tender of your engine, from this big engine, No. 719?

A. How far was it when I saw him?

Q. At the time you struck him, how far was he from this big engine No. 719, at the time your engine struck him?

A. He was six or seven feet, I guess.

Q. Did you see him after your engine struck him?

A. I saw him when he was pulled out.

Q. Was he dead?

A. He brought one or two breaths, I think, afterwards. He lived three or four minutes.

30 Upon cross-examination, witness said:

My engine was switch engine. It was No. 1551. I was coming up from the freight station. I was coming from the switching yard. I was constantly switching and shifting trains. On the switch yard, down near where Mr. Burgess was killed, engine No. 719 was standing. I was moving backward, going something like three or four miles an hour, I can't say how slow I was going. I was going slow with the engine under control.

This switch engine, No. 1551, as it came along backing very slowly, had the bell ringing. The fireman was ringing the bell. The fireman is named Grant Watson. He is a colored man. The switch engine was backing slowly—backing three or four miles an hour, and Grant was ringing the bell. I don't know where Noble Price was at that time. I reckon he was on front of engine, as he always was, but I don't know. The first time I saw him, was when we were standing around, looking at Mr. Burgess. My engine was moving backward to get some cars out of through freight train, which had come from Spencer, and was going to Pinners Point, in the State of Virginia.

At the time of the accident, we were going with switch engine to switch some cars out of train that had come from Spencer and was going to Pinners Point, in the State of Virginia. There was another

engine standing over on another track—engine No. 862. I did not know who Burgess was, except that I had heard him called Burgess, both before and after the accident, and he was the fireman on engine 862, of which Mr. Lawson was engineer. Engine No. 862 was being prepared to hitch on to another train that was hauling cars that had come from Pinners Point, Va., and was hauling cars into North Carolina. I do not know where they were going. I know we had made up that train for engine 862, and its crew, and I know that a part of the cars in that train had come in
31 from Pinners Point, State of Virginia, and were going further on in the State of North Carolina. I do not know how far they were going.

The first thing I saw of Burgess was while I was backing my engine three or four miles an hour; he came out from behind the big freight engine No. 719. Between the engine 719 and where the track is that Burgess was struck on, that is, the main line—there is a space of about eight feet or something like that. After Burgess came out from behind engine No. 719, if he had looked up the road in the direction that my engine was coming, he could have seen it. He could have seen it in plenty of time to have stopped, without standing or stepping upon the track. He did not look up the track. He looked sideways to me. When he first came out from around that engine No. 719 he had his head hanging down, looking down, and walking fast with his head down. He did not look up the track at all. He did not attempt to see if there was anything coming. It looked to me as if he could have seen my engine coming in time to have gotten out of the way. I was sitting in my cab. The engine was headed west, and was running backwards. I was sitting with my hand on the bra leaning with my elbow on window ledge, and was looking in the direction my train was moving. Just as soon as I saw Burgess come from behind engine 719, I put my brakes on in emergency, threw the bar in the forward motion gear. That was all I could do to stop the train, except that I could have given steam, but that would not have done any good. I did everything in my power that I could do to stop my train. Burgess was in about five or six feet of switch engine when he stepped up on track, and I ran about fifteen or seventeen feet—something like that. Burgess was underneath the engine, and just in between the engine and
32 tender when we pulled him out, so that after hitting him, the engine ran just the length of the tender.

Burgess was lying on the south rail, that is, the rail opposite from the rail where he stepped on the track. I did not hear any noise around there to prevent Burgess from hearing the bell. The bell on my engine was very distinct to me. I did not hear any blowing noise, that could prevent the bell being heard by Burgess. Burgess did not attempt to look up that track at all, after he came out from behind the engine; he just went right out in front of there. I guess he was familiar with the situation there. He had never worked on the yard, but he would come in and out there. He would come in and out there on the road.

Q. If a man had been standing on front of tender there, could he

have seen him in time to have stopped him coming in from behind engine there?

A. He might by speaking to him.

Q. I mean could he have stopped you in time to have kept you from hitting him?

A. No, sir, I don't suppose he could have seen him any quicker than I could. He could not have seen him any better than I could. He could not have stopped me.

The accident happened at 7:25 p. m. The sun set at that time of the year at 6:43. It was not dark. It was between sun set and dark. We were using oil headlight on the switch engine. The oil headlight is used generally on shifting engine. If there had been an oil headlight on that engine, at that time of the day, it would have cast very little light ahead. I say that, because it was not dark enough. At that time of the day an oil headlight would have caused very little light ahead, if any. I had a brakeman's lantern, with a red globe, on the end of tender. I did not have the oil headlight. The
33 glass in the oil headlight was broken down at the new yard, about an hour or two before that—about an hour or two before the accident the glass to the oil headlight had been broken, and I had substituted for it by putting in the red lantern.

On re-direct examination, witness said:

My crew consisted of Mr. Price, Capt. Strong, Grant Watson and myself. Strong was up in the yard, something like fifty or sixty yards west of me. He was looking up the numbers on some cars. Train No. 22 was supposed to be over at Wilson Mills at that time, if it had been on time. I did not flag train No. 22 that evening. I did not send a man back to flag train No. 22 after I reached the freight station. Train No. 22 had not passed Wilson's Mill at the time of the accident. It was not due. We were trying to get out these cars before train No. 22 reached there. When we left the freight warehouse, going east toward Goldsboro, when we reached the point where Burgess was killed, we had a red lantern on end of tender. We had no flagmen's lights. We had a red lantern—one such as is used in the railroad service for giving signals. It was not the regular headlight. The regular headlight had been broken an hour or so before that, and we could not use it at that time. The lantern that we were using was one that the firemen had had on engine, and had been on engine ever since the engine had been there. The fireman put that light on the end of tender. He put it on while we were standing at the freight station.

R. L. RAY, another witness for plaintiff, testified as follows:

I live at Selma, N. C. I don't recall the date of the accident, but I recall the accident. I had seen H. H. Burgess at station and saw him that evening after he was killed. I think he was killed about half past seven o'clock. Possibly it might have been that time of
day. I saw him in freight depot after he had been killed. I
34 recognized him as Mr. Burgess. I knew all the men running in there. He was a new one, and I had asked some one pos-

sibly thirty days before that time what his name was and they told me his name was Burgess, and I had seen him since I inquired who he was. I saw the engine and tender that killed him that evening. I saw it after the accident. I came by there from the post office. I went to the depot and we walked into the depot to see who it was, and someone told me before I got near there. I understood it was Mr. Burgess, and when I got in depot, I recognized his body as that of Mr. Burgess. He was dead at that time.

The switch engine was standing with tender, at that time on cinder pit track. This cinder pit track was on my way home. As I went by where Mr. Oliver was, I called him "A. J." It had no headlight on rear end; I did not see any, and there was none on it. I saw the whole engine. There was no light on the rear end, that is, the end toward Goldsboro, at the time of the accident. This was 15 or 20 minutes after the accident. I guess they brought Mr. Burgess' body from the point where he was killed up to the station immediately. He was in the station when I saw him. I know about the time the accident occurred. I do not know of my own knowledge when the accident occurred. I think it was while I was at the post office. I had a conversation with Mr. Oliver—just two or three words—which I suppose took place immediately after the accident—not over five minutes after the accident.

The engine had then been pulled in on cinder pit track and I was then on my way home from the depot. After I had been to the freight depot and had seen Mr. Burgess' body, I started home. Mr. Oliver was down on ground standing at step that goes up into engine. It was a shifting engine that was standing on cinder pit track. I could see clean along by it. I remarked to him and says, "Where is your light?"

35 On cross-examination witness said:

I live in Selma. I am practicing law in Selma. I knew Mr. Burgess by sight. I am acquainted with practically every one of the railway employees at Selma.

After I heard that he had been hurt or killed, I went up to the freight depot where his body was, as I was going home. I was on the other side of the railroad. My office from the freight depot is about 175 or 180 yards, or was at that time. My house is northeast of the freight depot. My office northwest and the post office is southwest. The engine was not on the main line. It was on cinder pit track when I saw it. I did not see the engine at the time of the accident.

The plaintiff offers in evidence the mortuary tables, showing expectancy of life of plaintiff's intestate.

E. D. DICKERSON, witness for plaintiff, being first duly sworn, testified as follows:

I am time keeper for the engineers and firemen of the Southern Railway Company on the Danville division. Mr. Burgess earned, during the month of April, $50.17.

On cross-examination, witness says:

I know what he earned other months by the records.

Q. I believe these are pay checks? (Counsel for defendant refers to checks which he has in his hand, and which he gives to witness).

A. Yes, sir.

Q. Call them off to the jury?

A. To H. H. Burgess——

By plaintiff's attorney, the following:

Q. When?

A. Here is one for the month of June, 98 cents; July, 1.41; August, $16.67; September, $33.18; October, $1.93; November, $35.31; December, $32.16; January, $7.19; February, $15.36; March, $24.75; April, $36.16.

36 By the Court, the following:

Q. Was this in 1910?

A. 1909. This is May, $47.17. He earned $50.17 and had a deduction of $3.00 for Y. M. C. A. meal tickets at Monroe.

By COUNSEL:

Q. What was the March for? What was that for?

A. The preceding month. This is dated May, 1909. It was for April services. He made $50.17 and had a deduction of $3.00. That was his wages they paid him after having whatever meal ticket there might have been deducted.

On re-direct examination, witness said:

I have a memorandum of what Mr. Burgess got (witness produces same). This check is dated April 15th, 1909. That is for March services. He made $50.00 and something over in April. I think these are all checks that were paid him for those months. They are supposed to be all. I know how much this man got; I can refer to the records and see how much he got in June, 1908. I can not say, without looking at the books; I don't remember and can't say whether this paper, which I have referred to for June, 1908, covered all that he got or not. It would depend upon how much a man worked, whether a man would stay in the employ of the railway company a year and not get more than $1.00 per month. I don't think he could stay and not get more than that. His wages depend upon the mileage he made. I can not say whether this $1.41 is all that the man got during the month of June or not, without referring to the records. I could not say that any of these papers contain all that Mr. Burgess got during any particular month.

On re-cross examination, witness said:

I have records for this man's wages here. I keep the time that a man makes in running to points on the Danville division.

37 The Danville division extends from Greensboro to Spencer, from Greensboro, N. C., to Monroe, Va., and from Greensboro, N. C. to Selma, N. C. These checks did not specify whether they were made on runs from Greensboro to Spencer or simply on Danville division. The time that a fireman makes is all kept in

the same way, whether it is made on the North Carolina Railroad from Greensboro to Selma, or from Greensboro to Spencer, or from Spencer to Richmond, Va., or to Danville, Va. The Danville division extends from Spencer, N. C., to Monroe, Va., and from Spencer, N. C., to Selma, N. C., and all that is made up on same ticket. I kept the record of the time made in 1908 and 1909 on the Danville division. I do not know whether this man ran all the time. He ran from Greensboro. He did not have any particular run. I did not keep the Winston time and I do not know whether he made any time on that division or not. Winston is not on the Danville division. I would not have a record of any time that this man made from Greensboro to Winston. I would not have a record of any time that he made in running from Charlotte to Spencer and from Greensboro to Wilkesboro or from Mount Airy to Sanford. I have a record which I have brought here at the instance of plaintiff's counsel. This record shows that sometimes he made more than $50.00 per month and sometimes less than $50.00 per month, according to the mileage he made. I entered the service as time keeper in July, 1908. I did not keep the records prior to that time and do not know how much time he made, except from the records, prior to July, 1908. I do not know of my own knowledge—without reference to the records, how much time he made after I became time keeper.

I was subpœnaed and commanded to bring the records of the company with me. I was directed to bring them by plaintiff's counsel.

38 Looking at the records (I can not tell how much time he made without the record), but looking at the records to refresh my memory, I find that in July, 1908, he earned $22.67, with a deduction of $6.00, and his check should have been $16.17. The deduction was $3.00 to the International Textile Book Co. and $3.00 for the Monroe Y. M. C. A. In August, 1908, he earned $39.18, with $6.00 deduction, leaving $33.18; $3.00 of this deduction was for the Monroe Y. M. C. A., and $3.00 for the International Book Co. In September, 1908, he earned $33.41, with $3.00 deduction. In October, 1908, he earned $38.31, with $3.00 deduction. In November, 1908, he earned $38.16, with $6.00 deduction. In December, 1908, he earned $10.19 with $3.00 deduction. In January, 1909, he earned $17.36, with $2.00 deduction, and his check should read $33.36. He earned $24.75 in February, 1909, and in March, 1909, he earned $42.16, with a deduction of $6.00. His check should read $36.16.

While firemen are employed on one division, they do not ordinarily, run on any other division, but at Greensboro it is customary for them to make a trip occasionally on the Winston division. That is, occasionally they are made to go on the Winston division. I do not know whether Mr. Burgess had to go on the Winston division at any time or not. I did not have the handling of that time, and do not know.

On re-direct examination, witness said:

Mr. Burgess was an extra fireman. He was to go wherever they sent him on this division. I think he sometimes went on the road from Mount Airy to Sanford; as that is the Winston division, I am not in position to say.

Q. Now, these papers that you read from—for instance, you read out of that book that in August he got $33.18, as you said a moment ago. I will ask you if that paper that you read from—handed to you just now and introduced in evidence—does not say
39 $16.00 and some cents?

A. This is not the August time. This is July time. I have the one that was given in July. Yes, sir, that check is a July check—paid in August, that is, the July check—July wages. That is what he earned—$16.17. It was paid in August; August 20th. It is supposed to be paid August 20th, therefore it is dated August.

Q. This is the one for September?

A. Yes. It amounts to $1.93.

For the month of September he got $1.93 on this check and the record shows that in addition he got $33.44, so that this $1.93 is in addition to the $33.44, and is entered on record in a separate place. I have a record of both. At first I overlooked the $1.93 in addition to the $33.44. I don't think there are any others, on this record that I have overlooked. I can very easily tell. I will have to look over the record again. I do not know anything about the line between Madison and Ramseur. I could not say whether the Southern Railway Company runs trains from Madison to Ramseur or not. I think Mr. Burgess ran over the Winston division at times. If there is a road from Madison to Ramseur, it would be on another division, and would not come under any part of my records. We would have nothing to do with that. I could not tell how far it is from Winston to Wilkesboro. I can not tell you how far it is from Winston to Sanford. Firemen are paid by the mile, and the distance they run.

The plaintiff here closed his case.

At the close of plaintiff's evidence, defendant moved for judgment of non-suit, and among other grounds, assigned the following:

1st. For that it appeared from the uncontradicted evidence in this case that at the time of the occurrence of the matters and things upon which this action is founded, namely, the injury to and
40 death of plaintiff's intestate, defendant, through its lessee, was a common carrier by railroad engaged in commerce between the several States, or some of them, and that plaintiff's intestate, was at the time of said occurrences and injuries a person employed by such common carrier in such commerce, and that such employee suffered injury and death while he was employed by such carrier in such commerce, and that the Act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, being Chapter 149, Statutes at Large, 65, exclusively regulated the liability of common carriers by railroad in such cases, and exclusively regulated the liability of this defendant to plaintiff's intestate in this action, and that plaintiff, upon all the evidence, had failed to make out a case of liability under such statute or to allege or prove a cause of action under the same, and defendant expressly set up and claimed a right, privilege and immunity under said statute of the United States and the protection of the same.

2nd. For that, if the Court should be of the opinion that the Act

of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, did not apply in this case, and did not exclusively regulate and fix the liability of defendant to plaintiff's intestate, then, under the laws of the State of North Carolina, plaintiff had failed to make out a case, and had failed to show sufficient facts to justify the Court in submitting same to the jury, and that plaintiff should, upon all the evidence, be non-suited.

The Court held that this suit was brought under the statute of North Carolina, and that the Act of Congress, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, had no application and that the cause was triable under the statutes of the
41 State of North Carolina. Defendant excepted.

Defendant's First Exception.

The Court then further overruled defendant's motion for judgment as of non-suit and defendant excepted.

Defendant's Second Exception.

Defendant declined to introduce any testimony and claimed the right to open and conclude the argument. The Court held that when defendant's counsel handed to the witness Dickerson the papers which the witness Dickerson identified as pay checks of H. H. Burgess, and when defendant's counsel asked witness Dickerson to call them off to the jury, that this was an introduction of evidence by defendant, and gave the plaintiff the right to open and conclude the argument. Defendant excepted.

Defendant's Third Exception.

The defendant, in apt time, requested the Court to charge the jury as follows:

1st. In this case, it is admitted that upon the 29th day of April, 1909, plaintiff's intestate was in the employment of the lessee of the defendant, in the capacity of fireman, under contract of a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862 in charge of Engineer Cyrus Lawson.

If the jury find from the evidence in this case that engine No. 862 was to be used on the evening of April 29th, 1909, and was on the evening of April 29th, 1909, being prepared to haul a train
42 over the North Carolina Railroad Company's line of railroad track, which had been leased to the Southern Railway Company, and that in said train was freight on empty cars, consigned and destined to points in States other than North Carolina, or freight coming from points outside of the State of North Carolina to points inside the State of North Carolina, in which freight or cars were being carried to their destination, then this would be triable and the

rights of the parties determined by and under the Act of Congress, approved the 22nd day of April, 1908, and known as "The Employers' Liability Act."

The Court refused to charge the jury as above, and defendant excepted.

Defendant's Fourth Exception.

2nd. If the jury believe the evidence in this case, then the deceased was an employee of a common carrier by railroad, engaged in interstate commerce, and was, at the time of the injury to plaintiff's intestate, engaged in such interstate commerce, the rights of the parties are to be determined under and by virtue of the Act of Congress, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908.

This was refused by the Court, and defendant excepted.

Defendant's Fifth Exception.

3rd. In this case, it is admitted that the defendant owns a line of railroad, extending from Charlotte, North Carolina, through Selma to Goldsboro, North Carolina, and that prior to the time of the injury complained of, the defendant had leased its entire line of railroad to the Southern Railway Company, and that H. H. Burgess was in the employ of the Southern Railway Company, in
43 the capacity of fireman, and was engaged, on the evening of the 29th of April, 1909, as fireman in the discharge of his duties as such fireman on engine No. 862.

If the jury find from the evidence that H. H. Burgess was on April 29th, 1909, stricken by a switch engine, being moved by defendant's lessee or its employees over a line of railroad belonging to defendant company, and leased to the Southern Railway Company, for the purpose of taking out or putting in a car in a train which was to be moved by defendant's lessee or its servants from Selma, North Carolina, to Pinners Point, in the State of Virginia, and if the jury further find from the evidence that the deceased was struck and killed by said switch engine, being moved over said tracks by defendant's lessee or its servants, for the purpose of taking car out of said train, known as the Pinner's Point train, which was to be moved by defendant's lessee or its servants from Selma, North Carolina, to Pinner's Point, in the State of Virginia, then the defendant was a common carrier by railroad, engaged in interstate commerce, and if deceased was engaged in the performance of his duties as fireman, on engine 862, which engine was being prepared to haul a train over the road of defendant company, containing freight or cars, intending to and being in movement from the State of North Carolina to some point in another State, then the defendant was a common carrier of freight by railroad, engaged in interstate commerce, and the deceased was an employee of such railroad or its lessee and was engaged in interstate commerce, and the rights of the parties in this action, would be triable under, and determined by an Act of Congress of the United

States entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22nd, 1908.

The Court refused to charge the jury as requested by de-
44 fendant in defendant's third request for instructions. Defendant excepted.

Defendant's Sixth Exception.

4th. In this case, upon all the evidence, if the jury believe the same, the jury will answer the first issue "No."

The Court refused to charge the jury as requested in Defendant's Fourth Request for Instructions. Defendant excepted.

Defendant's Seventh Exception.

5th. If the jury believe the evidence in this case, the defendant was a common carrier by railroad, engaged in interstate commerce, and deceased was an employee of such railroad of its lessee, and was, at the time of the injury complained of, engaged in interstate commerce.

The Court refused to charge the jury as requested in Defendant's Fifth Request for Instructions. Defendant excepted.

Defendant's Eighth Exception.

6th. If the jury find from the evidence in this case that plaintiff's intestate was on the 29th of April, 1909, an employee of a common carrier by railroad, engaged in interstate commerce, and was, at the time of the injury complained of, engaged in interstate commerce, then, upon all the evidence in this case, the jury would answer the first issue, "No."

The Court refused to charge the jury as requested in Defendant's Sixth Request for Instructions. Defendant excepted.

45 *Defendant's Ninth Exception.*

In this case, among other grounds of negligence, it is alleged that the defendant's lessee was guilty of negligence in that the tender of the said engine was not furnished or equipped with headlight on the front end, so as to enable said intestate to foresee his danger.

If the jury find from the evidence in this case that the defendant's lessee, for whose acts defendant is claimed to be liable, was a common carrier by railroad, engaged in interstate commerce, and if the jury further find from the evidence that plaintiff's intestate was a servant or employee of defendant's lessee and was, at the time of the injury complained of, engaged in such interstate commerce, or commerce between the States, and if the jury should further find from the evidence that there was, or had been a headlight on the front or lead end of the said switch engine, and that said headlight was not

burning at the time of the injury complained of, and if the jury should further find from the evidence that the said headlight was broken during the evening of the said 29th day of April, 1909, and shortly previous to the time of the said accident and that said switch engine was being used without said headlight until same could be repaired within a reasonable time, then, upon all the evidence in this case, the jury would, as to that allegation of negligence, answer the first issue, "No."

The Court refused to charge the jury as requested in Defendant's Seventh Request for Instructions. Defendant excepted.

Defendant's Tenth Exception.

8th. If the jury find from the evidence that defendant's lessee was a common carrier by railroad, engaged in interstate com-
46 merce, and that plaintiff's intestate was, at the time of the injury complained of, an employee of the defendant's lessee, and was engaged in such interstate commerce, and if the jury further find from the evidence that plaintiff's intestate was stricken by an engine moving backwards over track of defendant's lessee, and that said engine had no headlight on the leading end of the said tender, and if the jury should find from the evidence that a red lantern had been placed where the headlight belonged, and that this was reasonably sufficient to take the place of a headlight, the jury will answer the first issue "No," as to that allegation of negligence.

The Court refused to charge the jury as requested in Defendant's Eighth Request for Instructions. Defendant excepted.

Defendant's Eleventh Exception.

9th. If the jury find from the evidence, that on the evening of April 29th, 1909, shortly after sunset, plaintiff's intestate, while crossing one of the tracks of defendant's railroad, which was under lease to defendant's lessee, was stricken by a switch engine moving backward over said track, and if the jury should further find from the evidence that said switch engine had no headlight on the lead end of said switch engine, this would not justify the jury in answering the first issue "Yes" upon that allegation, unless the jury should further find from the evidence that the absence of the headlight was the proximate cause of the injury.

If the jury find from the evidence that there were two tracks parallel or nearly parallel to each other on the yard of defendant at Selma, and that on the northern track an engine was standing, heading west, with the tender toward the east, and if the jury further find from the evidence that the switch engine which struck plaintiff's intestate—if any did strike him, was moving eastwardly on
47 a parallel track, or nearly parallel to the standing engine, without a headlight on the leading end and that plaintiff's intestate crossed immediately behind the tender of the engine that was standing still, so that the tender shut or cut off the view of

plaintiff's intestate from the approaching engine, the absence of the headlight would not be the proximate cause of the injury, unless the jury find from the greater weight of the evidence that if there had been a headlight such as are in general use on the lead end of the approaching switch engine, that it would have made known the presence of the switch engine to plaintiff's intestate in time for him to have stopped and avoided the injury, the jury will answer the second issue "No," as to that allegation of negligence.

The Court refused to charge the jury as requested in Defendant's Ninth Request for Instructions. Defendant excepted.

Defendant's Twelfth Exception.

10th. In this cause, it is alleged, among other grounds of negligence, that defendant's lessee did not have a brakeman on the front end of the tender of said engine. If the jury find from the evidence that defendant's lessee was a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was an employee of defendant's lessee, and was, at the time of the injury complained of, engaged in such interstate commerce, then this action would be triable under the laws of the United States, and the defendant would be entitled to the benefit and protection thereof, and subjected to the liabilities imposed thereby, and if the jury should find from the evidence that plaintiff's intestate suddenly came on track of defendant's railroad from behind the tender of an engine standing still, and was stricken by the said switch engine, backing on an adjacent
48 track, and should further find from the evidence that if a person had been standing on the lead-end of the tender, as it was backing, he could not have warned plaintiff's intestate nor have stopped the engine in time to have avoided the injury, the jury will answer the first issue "No" as to that allegation of negligence.

The Court refused to charge the jury as requested in Defendant's Tenth Request for Instructions. Defendant excepted.

Defendant's Thirteenth Exception.

11th. If the jury find from the evidence in this case that defendant's lessee was a common carrier by railroad, engaged in interstate commerce and that plaintiff's intestate was an employe of the defendant's lessee and at the time of the injury complained of, was engaged in interstate commerce, then this case would be triable under the laws of the United States, especially the Act of Congress approved April 22nd, 1908, and the defendant would be liable to the penalties therein imposed and entitled to the benefit and protection therein given, and if the jury find from the evidence that plaintiff's intestate suddenly came upon one of the tracks of defendant's railroad, leased as aforesaid, from behind the tender of an engine that was standing upon an adjacent track, and was stricken by a switch engine moving backward, with no one on the front or leading end of the tender, then the jury will, as to the

allegation of negligence that there was no one on the lead-end of the tender, answer the first issue, "No."

The Court refused to charge the jury as requested in Defendant's Eleventh Request for Instructions. Defendant excepts.

49 *Defendant's Fourteenth Exception.*

12th. If the jury find from the evidence that an engine was standing on one of the side tracks of defendant company, heading west with the tender to the east, and if the jury further find from the evidence that plaintiff's intestate walked from behind the tender of the engine, standing on said side track, to and upon the main line of defendant, upon which a switch engine was moving, and if the jury find from the evidence that the engineer in charge of the said engine was looking back from his cab, in the direction in which his switch engine was moving, and that said engineer saw plaintiff's intestate as soon as he stepped from behind the tender, standing on the adjoining track, and immediately, or as soon as he could, reversed his engine and applied his air brakes in emergency and attempted to stop and failed so to do; then the Court charges you, as a matter of law, that the absence of a man on the front or leading end of the tender would not be the proximate cause of the injury, and the jury will, as to that allegation of negligence, answer the first issue, "No."

The Court refused to charge the jury as requested in Defendant's Twelfth Request for Instructions. Defendant excepted.

Defendant's Fifteenth Exception.

13th. In this cause, among other grounds of negligence, it is alleged that the engineer in charge of the shifting engine, which is alleged to have stricken plaintiff's intestate, was reckless, careless and incompetent and failed to ring his bell and to sound his whistle as required by the rules of the defendant company. The Court charges you, as a matter of law, that there is no evidence that this accident took place at any crossing, and that there is no evidence of any rule of the company requiring its bell to be rung or its whistle
50 sounded for a movement of this character, and as to that allegation of negligence, upon all the evidence, the jury will answer the first issue, "No."

The Court refused to charge the jury as requested in Defendant's Thirteenth Request for Instructions. Defendant excepted.

Defendant's Sixteenth Exception.

14th. If the jury find from the evidence in this cause, and by the greater weight thereof, that on the evening of the 29th day of April, 1909, plaintiff's intestate was in the employ of defendant's lessee as a fireman, and that an engine and tender was standing on a side track of defendant company, next to its main line, and that at the same time a switch engine was backing down the main line eastwardly without a headlight and without anyone on the front end of

the tender, and should further find from the evidence, by the greater weight thereof, that the bell was ringing and that the engineer was looking out of his window backward, that is, in the direction in which the engine was moving, and should further find from the evidence, by the greater weight thereof, that plaintiff's intestate stepped from behind the tender of an engine, standing on the side track, up on to the main line, within a distance of about six feet of the moving switch engine, and that the engineer in charge of the switch engine saw plaintiff's intestate as soon as he stepped from behind the tender of the engine, standing on the side track and before he stepped on the main line, and immediately reversed his engine and applied his air brake in emergency and stopped his engine as soon as he could, and plaintiff's intestate was run over and killed, and if the jury further find from the evidence, could, if he had looked before going upon the main line, have seen the approaching switch engine, the jury will answer the first issue, "No."

51 The Court refused to charge the jury as requested in Defendant's Fourteenth Request for Instructions. Defendant excepted.

Defendant's Seventeenth Exception.

15th. This brings us, gentlemen of the jury, to the question of the second issue, that is, contributory negligence. Upon all the evidence in this case, if the jury believe the same, the jury should answer the second issue, "Yes."

The Court refused to charge the jury as requested in Defendant's Fifteenth Request for Instructions. Defendant excepted.

Defendant's Eighteenth Exception.

16th. If the jury find from the evidence that plaintiff's intestate was in the employ of the lessee of defendant company and that on the evening of April 29th, 1909, an engine was standing on a side track adjacent to the main line of defendant company, which engine was headed west and the tender to the east, and if the jury should further find from the evidence, that a switch engine was moving eastwardly along the main line of defendant company's railroad, and that plaintiff's intestate stepped from behind the tender of a switch engine, standing on the side track, into the space between the side track and the main line, and then stepped on to the main line, in front of a moving switch engine, so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence, plaintiff's intestate could if he had stopped, looked and listened, or if the jury should further find from the evidence that if plaintiff's intestate had looked in the direction from which said switch engine was coming, before stepping on to the main

52 line in front thereof, if he did so step, that then plaintiff's intestate could have seen the approaching switch engine and avoided the injury, plaintiff's intestate would be guilty of contributory negligence, and the jury thereupon would answer the second issue, "Yes."

The Court refused to give Defendant's Sixteenth Request for Instructions. Defendant excepted.

Defendant's Nineteenth Exception.

17th. If the jury find from the evidence that plaintiff's intestate was in the employ of lessee of defendant company, and that on the evening of April 29th, 1909, an engine was standing on a side track adjacent to the main line of defendant company, which engine was headed west, and the tender to the east, and if the jury should further find from the evidence that a switch engine was moving eastwardly along the main line of defendant's railroad, and that plaintiff's intestate stepped from behind the tender of an engine, standing on the side track into the space between the side track and the main line, and then stepped on to the main line in front of a moving switch engine, so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence that plaintiff's intestate could, if he had stopped, looked and listened, or if the jury should further find from the evidence that if plaintiff's intestate had looked in the direction from which said switch engine was coming, before stepping on to the main line, in front thereof, if he did so step, that then plaintiff's intestate could have seen the approaching switch engine and avoided the injury, plaintiff's intestate would be guilty of contributory negligence, and this would be true, even though the jury should find by the greater weight of the evidence that there was no headlight on the switch engine, and should further find by the greater weight of the evidence that there was no
53 one on the front or leading end of the tender, and the jury would answer the second issue "Yes."

The Court refused to charge the jury as requested in Defendant's Seventeenth Request for Instructions. Defendant excepted.

Defendant's Twentieth Exception.

18th. It is negligence for a person to go upon or attempt to cross over a railroad track, without looking and listening for approaching trains, and if the jury find from the evidence in this case, by the greater weight thereof, that plaintiff's intestate could, if he had looked and listened for the approaching train, have seen or discovered that the switch engine, which struck plaintiff's intestate, if you find from the evidence that he was stricken by a switch engine, and could have avoided the injury, then you will answer the second issue, "Yes."

The Court refused to charge the jury as requested in Defendant's Eighteenth Request for Instructions. Defendant excepted.

Defendant's Twenty-first Exception.

19th. Gentlemen of the jury, if you answer the first issue "No," you need go no further in this case. If you answer the second issue "Yes," then you need not consider the case further, and an-

swer the third issue, unless you find from the greater weight of the evidence that defendant's lessee was a common carrier by railroad, engaged in interstate commerce and that plaintiff's intestate was an employee of defendant's lessee, and at the time of the injury complained of, was engaged in such interstate commerce. If, however, you find from the evidence, by the greater weight thereof, that defendant's lessee was a common carrier by railroad, engaged
54 in interstate commerce and that plaintiff's intestate was an employee of defendant's lessee, and at the time of the injury complained of, engaged in interstate commerce, then you will consider the third issue, even though you find the third issue, "Yes."

The Court refused to charge the jury as requested in Defendant's Nineteenth Request for Instructions. Defendant excepted.

Defendant's Twenty-second Exception.

20th. Upon all the evidence in this case, the Court instructs you, as a matter of law, to find the third issue "Nothing."

The Court refused to instruct the jury as requested in Defendant's Twentieth Request for Instructions. Defendant excepted.

Defendant's Twenty-third Exception.

The Court charged the jury as follows:

Gentlemen of the Jury: This is an action brought by James A. Zachary, administrator of Herbert H. Burgess, against the North Carolina Railroad Company, to recover damages for the alleged negligent killing of Herbert H. Burgess, on the 29th day of April, 1909, at Selma, North Carolina. And the plaintiff alleges that the negligence which resulted in the death of the intestate consisted of certain negligent acts of the defendant and its agents, which it enumerates as follows:

First. That the defendant was negligent in running its shifting engine in the night time or after sunset at a reckless and dangerous rate of speed, at a dangerous place, and without the display of proper signals.

Second. In that there was not an adequate and competent crew in charge of said shifting engine.

Third. In that the engineer in charge of said shifting
55 engine was reckless, careless and incompetent, and failed to ring his engine bell and to sound his whistle, as required by the rules of the defendant company.

Fourth. In that the defendant did not have a brakeman on the front end of the tender of the engine.

Fifth. In that the tender of said engine was not furnished or equipped with a headlight on front end, so as to enable intestate to foresee his danger.

Sixth. In that the defendant failed to exercise proper vigilance and reasonable care in observing the track and keeping a proper lookout.

Seventh. In that the defendant placed and kept another engine on an adjoining track, in such close proximity to main track as to make it impossible for intestate to see the approach of said moving engine.

Eighth. In that the defendant permitted engine No. 719 on adjoining track, to keep its blower on and make such a noise as to prevent intestate from hearing the approach of said shifting engine.

Ninth. In that the defendant company and its lessee failed to exercise reasonable care to provide for the safety of those engaged and compelled to do work on said switch yard.

And that while on the said date the intestate of the plaintiff had left his engine and was passing around the end of the tender of an engine standing upon the side track in attempting to cross the main track, he was run over and killed by the shifter upon the main track, which was then going east, and that his death was brought about by the negligent acts of the defendant, or some of them.

Now, the defendant denies all these allegations of negligence and sets up what is known as the plea of contributory negligence.
56 It says that on the 29th of April, the plaintiff's intestate was a fireman in the employment of the defendant's lessee, was a member of the crew of 862, which was standing upon the side track at Selma, and that without observing the care and caution that a prudent man should have observed under the circumstances, negligently and carelessly stepped out from behind engine 719, immediately in front of another engine, which was moving upon a parallel track, and was struck by the said engine and killed, and that his negligence in doing so was the proximate cause of his injury, and that he went upon the track without stopping to look and listen for the approach of a train, and was killed by reason thereof, and it pleads that as contributory negligence. It alleges that he could have seen and heard the approach of the engine before he stepped upon the track, and that his failure to observe such care and caution as would have enabled him to have seen or heard this approaching engine, was contributory negligence, and bars his recovery.

Now, on these pleadings the following issues are submitted to you, gentlemen:

1. Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant, as alleged in the complaint?

2. Did the intestate of the plaintiff contribute to his death by his own negligence?

3. What damage, if any, is plaintiff entitled to recover?

This action is brought, gentlemen, against the North Carolina Railroad Company, which is the owner of this road, but it has leased it to the Southern Railway Company, which now operates it, and which is known as the lessee, but the North Carolina Railroad Company is, under the law, responsible for all the acts of its lessee.

Now, it becomes necessary, gentlemen, for you to know
57 what negligence is, and in general terms it exists when there has been a failure to exercise proper care in the performance of some legal duty, which the defendant owes the plaintiff under the

circumstances in which they are placed, and proper care is defined as being that degree of care which a prudent man should use under like circumstances and charged with a like duty.

The proximate cause of an injury is one that produces the result in continuous sequence, and without which the injury would not occur, and one from which any man of ordinary prudence would foresee that such result was probable, under all the facts as they existed.

The plaintiff contends in this case, gentlemen, under the first issue, that the defendant was negligent, and that its negligence was the proximate cause of the death of the intestate. It contends, in substance, that at Selma the defendant had established a switch yard, in which there were six tracks, most of them running parallel with each other, but one of them, either the main track, or the track adjoining it, run not quite parallel, but in a little angle toward the other; that this yard was used by the crews of the different trains that came in there for shifting and making up trains; that the plaintiff's intestate was a member of a crew of a train which had come into Selma and upon that yard; that he was a fireman on this train, which had just come in, and that his engine was standing upon one of these tracks; that next to the track on which his engine was standing; there was another engine and tender fronting west; that this large engine was making a good deal of noise—you heard the testimony of the witnesses describing the kind of noise it was making—and that while those two engines were so standing the shifting engine in charge of Mr. Oliver, the engineer, who has testified, was coming east along the main track. The plaintiff did contend—but I presume I did not catch the
58 contention in the argument—but when the complaint was filed, there was some question in the mind of the plaintiff as to whether the bell was ringing or not, but the evidence introduced here, gentlemen, and all of the evidence, is that the bell on the shifting engine was ringing as that engine was moving east.

It is in evidence, gentlemen, that the boarding house of the plaintiff's intestate was in a direction across those tracks from where his engine stopped. The plaintiff contends that his intestate left the engine to which he was attached, crossed the track upon which the large engine was standing, going behind the tender, and was in the act of attempting to cross the main track when he was stricken by the switching engine on the main track and killed.

The plaintiff contends that the main track and the track on which the large engine stood, were close together—about some eight feet apart, and that when there were two engines with tenders, one on each track, the main track and the track on which the big engine was standing, the space between the two tenders was something like two feet.

The plaintiff contends that as his intestate came from his engine and passed around the rear of the large engine, that he could not see up the track in the direction from which the shifting engine was coming; that the large shifting engine obscured his view, so that he was in four or five feet of the track before he could have seen any-

thing up in the direction from which the shifting engine was coming.

The plaintiff says and contends that the large engine near which he was, was making so much noise that the plaintiff's intestate could not hear the bell which was ringing on the shifter approaching it, and he contends that it was dark, and that there was no headlight on the rear of the tender then approaching it, the shifting engine running backward at the time, and that under all the cir-
59 cumstances that surrounded him, his view obscured, as he says, by this engine, by the tender of this large engine, the darkness, the absence of a headlight, the deadening of the noise of the bell by the noise made by the engine, that he could not hear the bell that was ringing, he could not hear the noise that the shifting engine was making, as it aproached him, and that he could not see it, and that under those circumstances, he stepped on the track and almost as soon as he got upon the track, the shifter, which was then running, as the plaintiff contends, at the rate of 15 or 20 miles an hour, struck and killed him almost instantly.

Now those are the contentions of the plaintiff about that.

The defendant, on the other hand, contends that the engine on the side track was not making a noise. Says that it has shown to you by the engineer who was running the shifting engine, that it was not making any noise. He says he did not hear any noise from it.

It has shown to you that the bell was ringing. It contends that a man of ordinary watchfulness and carefulness ought to have heard that bell ringing, and he ought to have heard the movement of the train as it came down toward the place where he was about to cross, that he would have heard it if he had been exercising ordinary care. It says that while it is true that it did not have the headlight on the rear of the tender, having broken it about an hour before, it had put up a brakeman's or switchman's lantern, which had a red globe on it, making a red light; that that was on the back of the tender and could have been seen by any one who was exercising ordinary care to see. It says, too, that it was not dark; that it was early in the evening. It says about half past seven, or 25 minutes past seven o'clock on the 29th of April, and that it was not dark, and that a man could have been seen by the daylight that
60 then remained, if he had looked, that an engine was coming down in that direction.

The defendant says that the train was running at a rate of speed of not greater than three or four miles an hour, as it passed the point where the intestate was struck, and in evidence of that, it says that as soon as the engineer saw this unfortunate man coming from behind the tender, he reversed his engine and put on his emergency brakes, and that it run from 15 to 17 feet after it struck him before he could stop it. The defendant says that shows that it was running at a very moderate rate of speed.

So there you have the contentions of the parties, gentlemen.

Your first inquiry, gentlemen, ought to be whether or not it was dark enough to have a headlight, and upon this evidence—and you will recall the evidence of these witnesses, one witness, one of the

Mr. Prices, Mr. Henry Price—says it was dark. The first witness, Mr. Noble Price, does not say whether it was dark or not—says he could not say about that—but he had his lantern in use as a brakeman lighted at the time and was standing on the steps of the engine with the lighted lantern.

The engineer, Mr. Oliver, testifies that it was not dark; that he put out this brakeman's lantern preparatory to moving around when it did get dark, but that it had not become dark enough to have kept a man from seeing that engine some considerable distance off, and he says that he knows that is so, because he saw, being on the lookout himself, he saw Mr. Burgess when he stepped from behind the tender of the big locomotive and started toward the track; that he was sitting in the engine and he could see that distance, the distance from his seat in the engine, and he could see that distance from the tender, that he could see him there; and the defendant says that Burgess could have seen the engine if he had
61 looked, being a very much larger and bulkier object, when he came from behind the tender he could have seen it, even though it had no light on it.

Then, gentlemen, the burden, of course, is upon the plaintiff on this issue, to satisfy you as to every fact necessary to enable you to answer this issue in his favor.

(A) In order to make it the duty of the defendant to have had the headlight there, he must satisfy you that it was dark, sufficiently dark to make it proper to have a headlight. If he has so satisfied you, gentlemen, by the greater weight of the evidence, then you will take that into consideration. If you find that it was dark enough to make it necessary for the protection of the passers along the track and for the proper movement of the train, that the headlight should have been there, you will take that into consideration. You will determine that question. If you say, "yes it was," why then, gentlemen, I charge you, upon that finding by you, if you find it, that it was the duty of the railroad company to have had a headlight on the rear of that tender, and that if it had no headlight, it would be guilty of negligence, by reason of its failure to have. That would be one of the elements of negligence that you would consider. Then, gentlemen, if the plaintiff has further satisfied you, by the greater weight of the evidence, of the failure to have this headlight burning upon the engine, in consequence of its being dark enough to require its presence, and this failure was the proximate cause of the injury to the plaintiff's intestate, then you would answer that first issue, "yes.")

To that part of the charge, just above quoted, in parenthesis, and marked "A," defendant excepts.

Defendant's Exception No. Twenty-four.

Otherwise, gentlemen, unless you make all those findings
62 in favor of the plaintiff, you would answer the first issue "no," the burden being upon the plaintiff to satisfy you, by the greater weight of the evidence, of every fact necessary, as I

have explained, to justify a finding in the affirmative upon this issue.

Another allegation of negligence is that under the circumstances, and without a headlight on the tender, the defendant ran its shifting engine backward over this main track, at a dangerous rate of speed, with the knowledge of its employees—these train crews—might be in or upon the tracks, or crossing over the same. There is no evidence, gentlemen, as to the rate of speed prescribed by the rules of the company for the movement of its shifting engines over that yard, and so far as the rate of speed—whatever you find it to be—is concerned, I charge you that that in itself would not be negligence.

(B) I further charge you, however, gentleman, that you may take that into consideration, taken in connection with the conditions which existed there, the presence of this large engine which was making a noise, if you find it was making a noise; the fact that persons passing over the track there might pass behind the tender of this big engine and have their view of the track obstructed, if you find it was obstructed, as circumstances to be considered by you, upon the question as to whether the speed, the position of the big engine, the noise of the engine, the absence of the light, if you find it was absent, the darkness, if you find it was dark, the running of the shifting engine, under those circumstances and with those surroundings, constituted a negligent operation of the shifting engine over the main track. Now, if the plaintiff has satisfied you, gentlemen, taking all those circumstances together, that it was conduct which a man of ordinary foresight could foresee was likely to result in injury to some one, why then that operation would be negligence, and if you should find that the plaintiff's in-
63 testate was killed as the proximate cause of such operation, then you should answer the first issue, "Yes.")

To that part of the charge just above quoted, in parenthesis, and marked "B," the defendant excepts.

Defendant's Twenty-fifth Exception.

Otherwise, you should answer it "No," remembering that the burden is upon the plaintiff to satisfy you, by the greater weight of the evidence of all these facts and circumstances necessary to make the defendant negligent, and to satisfy you that this negligence was the proximate cause of the intestate's injury.

The plaintiff also contends, gentlemen, that the defendant was negligent if this occurrence happened in the day time, in not having a flagman on the tender.

(C) "The plaintiff says that if it was in the night time, the defendant ought to have had a headlight there; that if it was in the day time, running through a yard like that, with six tracks on it, a number of engines and trains of cars, train crews in the yard, or likely to be in the yard, that if it was in the day time, the defendant ought to have had a flagman on the tender for the purpose of keeping a lookout; that it was its duty to have done this; and if you find, gentlemen, that the injury was inflicted in the day time,

when the movement of persons along or across the track could be seen and it was light enough to see the movement of the engine, then I charge you, gentlemen, that it was the duty of the defendant to have had a flagman on the rear of the tender, and the failure to have him there would be negligence, unless you further find, gentlemen, that the engineer, from where he was sitting in his engine, could keep this lookout, a proper lookout—upon the track, as he backed his train along it.

64 He says that he was in that position, and that he did keep that outlook. If that is so, gentlemen, I do not think, under the circumstances of this case, it would have been the duty of the defendant to have had a flagman on the end of the tender, because the engineer could have fully discharged that duty, if you find the facts to be as testified to by him; but, if you do not so find, then it was the duty of the defendant to have had the flagman on the tender, and if it failed to have him there—and there is no evidence that he was there—that would be negligence. And if you should further find, gentlemen of the jury, that if there had been a flagman there on the lookout, that he could, by the exercise of ordinary care and watchfulness, have discovered that the plaintiff's intestate was either on or about to go on the track, and by giving him proper warning, could have prevented the injury, then, if you find, gentlemen, that his absence was the proximate cause of the injury, you should answer the first issue "Yes.")

To that part of the charge just above quoted, and marked "C," in parenthesis, the defendant excepts.

Defendant's Twenty-sixth Exception.

Otherwise, upon this branch of the case you answer it "No," so far as the flagman is concerned.

If the jury find from the evidence, that on the evening of April 29, 1909, shortly after sunset, plaintiff's intestate, while crossing one of the tracks of defendant's railroad, which was under lease to defendant's lessee, was stricken by a switch engine, moving backward over said track, and if you further find from the evidence that said switch engine had no headlight on the lead end—that is the end going in front—of said switch engine, this would not justify the jury in answering the second issue "yes" upon that allegation, unless the jury should further find from the evidence, that

65 the absence of the headlight was the proximate cause of the injury.

If the jury find from the evidence that there were two tracks parallel or nearly parallel to each other on the yard of the defendant at Selma, and that on the northern track an engine was standing, heading west, with the tender toward the east, and if the jury further find from the evidence that the switch engine which struck plaintiff's intestate, if any did strike him, was moving eastwardly on a parallel track or nearly parallel to the engine standing, without a headlight, on the leading end, and the plaintiff's intestate crossed immediately behind the tender of the engine that was standing still, so that the tender shut or cut off the view of the plaintiff's intestate

from the approaching engine, the absence of the headlight would not be the proximate cause of the injury, or one of the proximate causes of the injury, unless the jury find from the greater weight of the evidence, that if there had been a headlight, such as are in general use, on the lead end of the approaching switch engine, that it would have made known the presence of the switch engine to plaintiff's intestate, in time for him to have stopped and avoided the injury and the jury will answer the first issue "No" as to that allegation of negligence.

You will see that, gentlemen, applies only as to the allegation as to the headlight.

If the jury find from the evidence that an engine was standing on one of the side tracks of defendant company, heading west, with the tender to the east, and if the jury further find from the evidence that plaintiff's intestate walked from behind the tender of the engine, standing on said side track, to and upon the main line of defendant, upon which a switch engine was moving, and if the jury find from the evidence that the engineer in charge of the said engine was looking back from his cab in the direction in which
66 his switch engine was moving, and that said engineer saw plaintiff's intestate as soon as he stepped from behind the tender, standing on the adjoining track, and immediately, or as soon as he could, reversed his engine and applied his air brakes in emergency and attempted to stop, and failed so to do, then the Court charges you as a matter of law that the absence of a man on the front or leading end of the tender would not be the proximate cause of the injury, and the jury will as to that allegation of negligence, answer the first issue, "No."

In this cause, among other grounds of negligence, it is alleged that the engineer in charge of the shifting engine, which is alleged to have stricken plaintiff's intestate, was reckless, careless, and incompetent, and failed to ring his bell and to sound his whistle as required by the rules of the defendant company. The Court charges you as a matter of law, that there is no evidence that this accident took place at any crossing, and no evidence as to any rule of the company requiring its bell to be rung, or its whistle sounded, or as to the movements of the character engaged in on that occasion.

Now, gentlemen, if you find the first issue "Yes," then you will proceed to consider the other issues. If you answer it "No," you need proceed no further, as that will end the case. The first issue, you understand, is addressed to the negligence of the defendant, and the question of whether or not its negligence was the proximate cause of the killing of the intestate. If you answer that "Yes," then you proceed to consider the second issue, which is: Did the intestate of the plaintiff contribute to his death by his own negligence?

On the second issue, the burden is upon the defendant to satisfy you by the greater weight of the evidence of all the facts necessary to enable you to find this issue "Yes." If the defendant has not so satisfied you, you will answer it "No." Now, the defendant contends that the intestate came to his death by reason of his
67 own negligence, and that his negligence was the proximate cause of his death. It says, in the first place, that it was

light enough that evening as the intestate came around the rear of the tender of the big engine and reached a position where he could see up the track, light enough for him to have seen the engine coming by the daylight that then existed; that if he had been in the exercise of ordinary care and caution, he could have seen a large body like the tender and the engine coming down the track toward him, and that there was some space between the side of the tender, where it was next to the track on the main track, and before he got upon the main track, which would have afforded him a prospect up the road in the direction in which the shifting engine was coming; that if he had looked there, he could have seen it.

It says, whether it was light enough for him to have seen the body of the engine and tender coming down the track if he had exercised proper care and watchfulness, that he could have seen the light. That there was, he says, a lantern hung on the back end of the tender with a red globe on it, sort of a bull's eye—I think some of them called it; that if he had looked, all he had to do was to look up the road and he would have seen that, and that if he had listened he would have heard the bell ringing, and that he would have heard the movement of that train, as it came along the track, and that he ought to have done those things and not to have ventured on the track without looking and listening, and if he did that, and the defendants says that is what he did, the defendants says that he went upon the track with his head hung down, and looking in an opposite direction from which that train was coming, paying no attention to the signals which were given or the sound of the moving train, not looking to see whether anything was coming, or whether there was any light moving down the road toward him, but
68 carelessly and heedlessly in attempting to get across the track, in a rapid movement, walking rapidly, thoughtlessly and carelessly went behind the edge of the tender, just a few feet in advance of the tender, some five or six feet or more, you will recall the evidence, and was struck and knocked down by the tender, and that is really the proximate cause of his death. It says that it was not running its engine too fast, considering the surroundings there; that its engine was going only three or four miles an hour, and that there was no unusual noise about the engine on the side track, which would have deadened the sound, so that he could not have heard if he had been listening. Now that is the contention of the defendant, and you have heard the evidence. The defendant has introduced no evidence here, gentlemen. The defendant relies, as it says, upon the witnesses in the case made out by the plaintiff, and it says enough evidence has developed introduced by the plaintiff himself, to satisfy you of the truth of its contentions.

Now the plaintiff, on the other hand, says that his intestate was not guilty of contributory negligence; that he acted like a man of ordinary prudence and caution would have acted under all the circumstances; that he had a right to assume that an engine going along that track at that time of evening, it being dark—and the plaintiff insists that it was dark—would have had a headlight on the tender, backing toward him, and when he was crossing the track on which engine was standing and behind the tender, he would have

seen it, and that he would not have gone on that track, and that he did not see it, and could not see it, because it was not there.

And the plaintiff says that the lantern was not there; that there was nothing that could have given him notice of the approach of that train in the way of lights; that it was too dark for him to see up the road there, and see the movement of that train, and that he could not hear, because of the noise of the engine that
69 was right at him, blowing off and making that noise described by the witness as you gentlemen will recall, and that he was doing what a man of ordinary prudence would have done, and that he had a right to assume that that train would not go up there under those circumstances, without a headlight, and with that noise going on around there, and through a yard in which the defendant's employees, working as train crews were, at a high rate of speed. He had a right to assume that, he says, and that under all those circumstances he acted like a man of ordinary prudence and watchfulness would have done.

Now those briefly, are the contentions of the parties on this issue of contributory negligence.

The burden, as I say, is upon the defendant to satisfy you by the greater weight of the evidence, and he can use all this evidence, it is not prevented from using it, because the plaintiff put the witnesses on the stand. It is the defendant's duty to satisfy you by the greater weight of that evidence that the plaintiff's intestate was guilty of contributory negligence, and that this contributory negligence was the proximate cause of the injury, and the defendant insists that it has done that, and that you ought to be so satisfied, and that you ought to answer that issue "Yes."

The plaintiff makes the opposite contention, and says that you ought to answer it "No." He says that the defendant has failed to satisfy you, and that on the contrary the plaintiff has satisfied you that the plaintiff's intestate acted like a man of ordinary prudence and caution.

Well now, gentlemen, it was the duty of the plaintiff's intestate to exercise the ordinary care, watchfulness and prudence of an ordinary prudent man, under all the circumstances that surrounded him, and in view of all the conditions existing at that time and place. Now he says he did that. He says in crossing there, there was an
70 obstruction, the side of the tender of this large engine, which cut off his view until he was very near the track; that it was dark and he could not see anything coming up the track, could not, if he had looked, and that the noise was so great on the engine by which he stood that he could not hear the ringing of the bell or the movement of the train coming down toward him.

Well now, gentlemen, it is the duty of a man ordinarily, crossing a railroad track, to look and listen for the approach of a train; that is a matter of ordinary prudence; but if there are obstructions or conditions which would prevent his seeing the train, why then to look, to be required to look, would be a useless thing. If there was such an obstruction either on account of this tender or on account of the darkness, and the absence of light, so that he could not have seen that engine if he had looked, why then there would be no obli-

gation to look. A man is only required to look for a thing that may be seen. But if the conditions were such, both as to the time of day or night and the obstruction, that by looking, exercising ordinary care to look, he might have seen, and he did not look, didn't exercise ordinary care and caution, and by reason of his failure to do so, and as a proximate cause thereof, he was run over and killed, that would be negligence on his part, and if you find that this negligence was the proximate cause of his death you answer this issue "Yes."

Or, gentlemen, if, under all the circumstances that surrounded him, he could, by the exercise of ordinary care and watchfulness, have heard that train coming, taking into consideration all the surroundings as you find them to be, the noise made by the engine on the side track, the ringing of the bell, and by exercising ordinary care and watchfulness in listening he could have either heard the bell as it rung or heard the movement of the train as it rolled
71 along the track, and he failed to exercise that care and watchfulness in listening, and you find that that failure was the proximate cause of his injury and death, you should answer this issue "Yes." As I say, the burden is on the defendant to satisfy you that he did fail to exercise that care and watchfulness, and that his failure to do so was the proximate cause of his injury, and if the defendant has failed to so satisfy you, you will answer it "No," upon both of those propositions as to listening and looking.

Now a man is required to listen only where anything may be heard, and if the noise of this engine on the side track was so great as to drown the sound of the bell, so that by reason thereof, he could not hear it, then there would be no obligation to listen for a thing that could not be heard.

Now, in connection with what I have already said to you, gentlemen, upon this second isue, and subject to what I have said, I give you the following further instructions:

If you find from the evidence that plaintiff's intestate was in the employment of the lessee of the defendant company, and that on the evening of April 29, 1909, an engine was standing on a side track adjacent to the main line of defendant company, which engine was headed west, and the tender to the east, and if the jury should further find from the evidence that a switch engine was moving eastwardly along the main line of defendant company's railroad, and that plaintiff's intestate stepped from behind the tender of a switch engine standing on the side track into the space between the side track and the main line, and then stepped on to the main line in front of a moving switch engine, so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence, plaintiff's intestate could, if he had looked and listened, or if the jury should further find from the evidence that if plaintiff's intes-
72 tate had looked in the direction from which said switch engine was coming before stepping on to the main line, in front thereof, if he did so step, that then plaintiff's intestate could have seen the approaching engine and avoided the injury, plaintiff's intestate would be guilty of contributory negligence, and if the jury

further find that this negligence was the proximate cause of the injury, the jury would answer the second issue "Yes."

I charge you further, gentlemen, that if you find from the evidence that plaintiff's intestate was in the employment of the lessee of the defendant company—that is, the Southern Railway Company—and that on the evening of April 29, 1909, an engine was standing on the side track adjacent to the main line of defendant company, which engine was headed west, and the tender to the east, and if the jury further find from the evidence that a switch engine was moving eastwardly along the main line of defendant railroad, and that plaintiff's intestate stepped from behind the tender of an engine standing on the side track into the space between the side track and the main line and then stepped on to the main line in front of a moving switch engine so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence plaintiff's intestate could, if he had looked and listened, or if the jury should further find from the evidence that if plaintiff's intestate had looked in the direction from which said switch engine was coming before stepping on to the main line in front thereof, if he did so step, that then the plaintiff's intestate could have seen the approaching switch engine and avoided the injury, and failed to look or listen and was thereby injured, plaintiff's intestate would be guilty of contributory negligence, and this would be true, even though the jury should find by the greater weight of the evidence, that there was no headlight on the engine,
and should further find by the greater weight of the evidence
73 that there was no one on the front or leading end of the tender, and in such event the jury would answer the second issue "Yes."

It is negligence for a person to go upon or attempt to cross over a railroad track, without looking and listening for approaching trains, and if the jury find from the evidence in this case, and by the greater weight thereof, that plaintiff's intestate could, if he had looked and listened for the approaching train, have seen or discovered that the switch engine which struck plaintiff's intestate was approaching—if you find from the evidence that he was stricken by a switch engine, and could have avoided the injury, then you will answer the second issue "Yes," provided you further find that he failed to look or listen, and that such failure was the proximate cause of the injury.

So, gentlemen, after considering the contentions of the parties, the evidence and the law as I have given it to you, you come to answer this second issue, "Did the intestate of the plaintiff contribute to his death by his own negligence?" if you answer that issue "No," you will proceed to consider the third issue; but if you answer it "Yes" you need not consider the third issue, because that will end the case. If the plaintiff's intestate was injured by his own contributory negligence in the language of this second issue, if that was the proximate cause of his death, if you say that was so, if you answer that "Yes," that ends the case. If you answer it "No," then you proceed to consider the third issue, "What damage, if any, is plaintiff entitled to recover?"

Now the burden of that issue is on the plaintiff to satisfy you by the greater weight of the evidence as to his damages, and if you come to that issue you consider all of the evidence that has been introduced on that subject.

You will recall the testimony of the young man, the time-
74 keeper of the railroad company, who was introduced as a witness by the plaintiff. You will remember what he said about how much the plaintiff's intestate earned by the month. You have heard this evidence discussed by counsel on both sides. You have heard the evidence about the tables of mortality and the young man's age; he was 27 years old, and according to these tables of mortality, which have been introduced in evidence and are to be considered by you, his expectancy was 37 and 4-10 years, you may consider that in passing upon the question of damages.

The plaintiff says you ought to give him a considerable amount of damages—a young man, he says, with all the promise of life before him, engaged in an occupation where his wages might largely have been increased on account of his efficiency and his character and sobriety. He says there is evidence, and there is evidence that he was a sober man and an industrious man. The plaintiff says that you ought to consider that this young man in a few years would have been getting a good deal more than he was earning at the time of his death. That you ought not to be bound entirely as to this evidence as to what he was earning then. The defendant says, on the other hand, that you ought to consider that he was engaged in a dangerous occupation, one in which life may be suddenly destroyed, and that his expectancy might not have been as long as 37 years, and that on that account he might have been injured and rendered helpless, so that he could not have earned as much as he was earning at the time of his death, and that all those things ought to be considered by you.

Now, gentlemen, our Supreme Court has laid down the rules which govern you in the assessment of damages. You are not to give anything for any suffering that this young man may have had. You are to give nothing because he has been taken off early in life. You
are to give nothing on account of any pain or suffering of any
75 of his kins-people. The law does not permit any of those things to be taken into consideration in determining how much you will give him. It undertakes merely to fix the cash value of his life. There are some cases in which the pain and suffering of a man who has been injured and of those who are dear to him may be considered, but this is not a cause of that sort. The purpose is to find the face value of his life to his estate, and the Court has laid down this rule for your government. Of course, unless you answer the first issue "Yes," and the second issue "No," you have no use for the law I am giving you now, because this one depends upon those answers to the foregoing issues. But if you answer the first issue "Yes," and the second issue "No," then you proceed to the third issue.

(D) The measure of damages for the loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living expenditures from his

gross income, and then estimating the present value of the accumulation from such net income, based upon his expectation of life.)

To that part of the charge just quoted, marked "(D)" in parenthesis, defendant excepts.

Defendant's Twenty-seventh Exception.

In applying this rule to the facts in this case, and to enable you properly to estimate the reasonable expectation of pecuniary advantages from the continuance of the life of the deceased, you should consider the age of deceased, his habits, his industry and skill, and his reasonable expectation of life, which, according to the mortuary tables, is 37 and 4/10 years. It is proper for you to take into consideration his occupation and his earning capacity. You will notice that the measure of damages is the present value of the de-
76 ceased's net income, and this is to be ascertained by deducting the cost of living and expenditures from the gross income, and then estimating the present value of the accumulation from such net income, based upon his expectation of life. The plaintiff, as I understand, gentlemen, insists upon the mortality tables giving the present cash value of the net income, insists that he would be entitled to recover upon that basis alone, something over $5,000. The defendant's counsel contends that in no event ought you to give him more than $1,125.00. You are to consider all these contentions, gentlemen.

If the plaintiff or defendant has made any contention here about any of these matters that has escaped me, don't let it escape you, because it is your duty, your business, to remember the contentions as well as the evidence. You are the sole judges of the contentions and the evidence that has been introduced, and you are the sole judges of the weight of it, how much evidence you will believe, and what weight you will give to it under the sanction of your oath. It is your duty to weigh it, and to give it such weight as you believe it to be entitled to. You are not bound to believe all that any witness says. You can take a part of it and discard a part of it as it satisfied you of its truthfulness. When you have weighed it that way and find how much you can believe and feel that you can rely upon it, you take that part of it, apply the law as I have given it to you, to those issues and say how you will answer them.

In passing upon these issues, gentlemen, you are not to be influenced by the fact that the defendant here is a corporation, and that the plaintiff is a private citizen. Consideration of that sort can not enter, ought not to enter into the determination of the rights of litigants in courts of justice, for if they do, and the jurors allow themselves to be influenced by them, you can readily see that the administration of justice in our courts becomes a mockery.
77 A corporation is entitled to the same rights before a jury of our country that an individual is entitled to, no more, no less—and an individual to the same considerations that a corporation is entitled to, no more, no less.

Take the issues and say how you find them, gentlemen.

The jury returned a verdict as set out in the record. Upon the coming in of the verdict, the defendant moved for a judgment of non-suit, nothwithstanding the verdict. Motion overruled. Defendant excepted.

Defendant's Twenty-eighth Exception.

Defendant then moved for a new trial:

1st. For error in refusing to charge the jury as requested and hereinafter specifically set out, and to the refusal of the Court to give that part of request for instructions specifically excepted to. Motion overruled. Defendant excepted.

Defendant's Twenty-ninth Exception.

Defendant then moved for a new trial for error in the charge of the Court, as hereinbefore specifically set out and excepted to. Motion overruled and defendant excepted.

Defendant's Thirtieth Exception.

Thereupon the Court assigned judgment as set out in the record, to which judgment defendant excepted, and prayed an appeal to the Superior Court.

Defendant's Thirty-first Exception.

Notice given in open Court and waived. Appeal bond fixed at fifty dollars ($50.00).

78 Defendant, as grounds for its appeal, assigns the following errors:

First Assignment of Error.

For that the Court held as a matter of law that the Act of Congress entitled, "An Act Relating to the Liability of Common Carriers to Their Employees in Certain Cases," ratified the 22nd day of April, 1908, and commonly known as the Employer's Liability Act, had no application to this cause, and that the defendant was not entitled to the benefit and protection of the provisions of the said statute, and refused to non-suit the plaintiff under the said statute and its provisions.

Second Assignment of Error.

For that after the Court held that this cause was brought under the laws of the State of North Carolina, and was triable under the laws of the State of North Carolina, and that the Act of Congress commonly known as the Employer's Liability Act, had no application to the cause, that the Court refused to sustain defendant's motion to non-suit plaintiff.

Third Assignment of Error.

For that the Court refused to give judgment for defendant upon the verdict.

Fourth Assignment of Error.

For that the Court refused to give judgment for defendant, notwithstanding the verdict.

79 *Fifth Assignment of Error.*

For that the Court refused defendant's request for instructions, which was as follows:

"In this case it is admitted that, upon the 29th day of April, 1909, plaintiff's intestate was in the employment of the lessee of the defendant, in the capacity of fireman, under contract of a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862 in charge of Engineer Cyrus Lawson. If the jury find from the evidence in this case that engine 862 was to be used on the evening of April 29th, and was on the evening of April 29th, 1909, being prepared to haul a train over the North Carolina Railroad Company's line of railroad track, which had been leased to the Southern Railway Company, and that in said train was freight on empty cars, consigned and destined to points in states other than North Carolina, or freight coming from points outside of North Carolina, to points inside of the State of North Carolina, in which freight cars were being carried to their destination, then this case would be triable and the rights of the parties determined by and under the Act of Congress approved the 22nd day of April, 1908, and known as 'The Employer's Liability Act.'"

Sixth Assignment of Error.

For that the Court declined to give defendant's second request for instructions, which is as follows:

"If the jury believe the evidence in this case, then the deceased was an employee of a common carrier by railroad, engaged in interstate commerce, and was, at the time of the injury to plaintiff's intestate, engaged in such interstate commerce, the rights of the parties are to be determined under and by virtue of the Act of
80 Congress entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' approved April 22, 1908."

Seventh Assignment of Error.

For that the Court refused to give defendant's third request for instructions, which is as follows:

"In this case it is admitted that the defendant owns a line of railroad, extending from Charlotte, North Carolina, through Selma to

Goldsboro, North Carolina, and that prior to the time of the injury complained of, the defendant had leased its entire line of railroad to the Southern Railway Company, and that H. H. Burgess was in the employ of the Southern Railway Company in the capacity of fireman, and was engaged on the evening of the 29th day of April, 1909, as fireman in the discharge of his duties as such fireman on engine No. 862.

If the jury find from the evidence that H. H. Burgess was on April 29th, 1909, stricken by a switch engine being moved by defendant's lessee or its employees over a line of railroad, belonging to defendant company and leased to the Southern Railway Company, for the purpose of taking out or putting in a car in a train which was to be moved by defendant's lessee or its servants from Selma, North Carolina to Pinner's Point, in the State of Virginia, and if the jury further find from the evidence that the deceased was struck and killed by the said switch engine being moved over said tracks by defendant's lessee or its servants, for the purpose of taking car out of said train, known as the Pinner's Point train, which was to be moved by defendant's lessee or its servants from Selma, North Carolina, to Pinner's Point, in the State of Virginia, then the defendant was a common carrier by railroad, engaged in interstate commerce, and if deceased was engaged in the performance of
81 his duties as fireman on engine 862, which engine was being prepared to haul a train over the road of defendant company, containing freight or cars intending to and being in movement from the State of North Carolina to some point in another State, then the defendant was a common carrier of freight by railroad, engaged in interstate commerce and the deceased was an employee of such railroad or its lessee and was engaged in interstate commerce and the rights of the parties in this action would be triable under and determined by an Act of Congress of the United States entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees, in Certain Cases,' approved April 22nd, 1908."

Eighth Assignment of Error.

For refusal of the Court to give defendant's fourth request for instructions, which is as follows:

"In this case, upon all the evidence, if the jury believe the same, the jury will answer the first issue 'No.' "

Ninth Assignment of Error.

For refusal of the Court to charge the jury as requested in defendant's fifth request for instructions, which is as follows:

"If the jury believe the evidence in this case, the defendant was a common carrier by railroad, engaged in interstate commerce and deceased was an employee of such railroad or its lessee, and was at the time of the injury complained of, engaged in interstate commerce."

82 *Tenth Assignment of Error.*

For refusal of the Court to give defendant's sixth request for instructions, which is as follows:

"If the jury find from the evidence in this case that plaintiff's intestate was, on the 29th of April, 1909, an employee of a common carrier by railroad, engaged in interstate commerce, and was at the time of the injury complained of, engaged in interstate commerce, then, upon all the evidnce in this case, the jury would answer the first issue 'No.'"

Eleventh Assignment of Error.

For refusal of the Court to give defendant's seventh request for instructions, which is as follows:

"In this case, among other grounds of negligence, it is alleged that the defendant's lessee was guilty of negligence in that the tender of the said engine was not furnished or equipped with headlight on the front end, so as to enable said intestate to foresee his danger. If the jury find from the evidence in this case, that the defendant's lessee, for whose acts defendant is claimed to be liable, was a common carrier by railroad, engaged in interstate commerce, and if the jury further find from the evidence that plaintiff's intestate was a servant or employee of defendant's lessee, and was, at the time of the injury complained of, engaged in such interstate commerce, or commerce between the States, and if the jury should further find from the evidence that there was or had been a headlight on the front or lead end of the said switch engine, and that said headlight was not burning at the time of the injury complained of, and if the jury should further find from the evidence that the said headlight was not burning at the time of the injury complained of, and if the jury should further find from the
83 evidence that the said headlight was broken during the evening of the said 29th day of April, 1909, and shortly previous to the time of the said accident, and that said switch engine was being used without said headlight until same could be repaired within a reasonable time, then, upon all the evidence in this case, the jury would, as to that allegation of negligence, answer the first issue 'No.'"

Twelfth Assignment of Error.

"If the jury find from the evidence that defendant's lessee was a common carrier by railroad, engaged in interstate commerce and that plaintiff's intestate was, at the time of the injury complained of, an employee of the defendant's lessee and was engaged in such interstate commerce, and if the jury further find from the evidence that plaintiff's intestate was stricken by an engine moving backwards over track of defendant, which had been leased to defendant's lessee, and that said engine had no headlight on the leading end of the said tender, and if the jury should find from the evidence that a

red lantern had been placed where the headlight belonged and that this was reasonably sufficient to take the place of a headlight, the jury will answer the first issue 'No,' as to that allegation of negligence."

The twelfth assignment of error was for failure of the Court to charge the jury as requested in defendant's eighth request for instructions, which is as just above set out.

Thirteenth Assignment of Error.

For refusal of the Court to charge the jury as requested in defendant's ninth request for instructions, which is as follows:

"If the jury find from the evidence, that on the evening of April 29th, 1909, shortly after sunset, plaintiff's intestate, while
84 crossing one of the tracks of defendant's railroad, which was under lease to defendant's lessee, were stricken by a switch engine moving backward over said track, and if the jury should further find from the evidence that said switch engine had no headlight on the lead end of said switch engine, this would not justify the jury in answering the first issue 'Yes' upon that allegation, unless the jury should further find from the evidence that the absence of the headlight was the proximate cause of the injury.

"If the jury find from the evidence that there were two tracks parallel or nearly parallel to each other on the yard of defendant at Selma, and that on the northern track an engine was standing heading west, with the tender toward the east, and if the jury further find from the evidence that the switch engine which struck plaintiff's intestate, if any did strike him, was moving eastwardly on a parallel track, or nearly parallel to the standing engine, without a headlight on the leading end, and that plaintiff's intestate crossed immediately behind the tender of the engine that was standing still, so that the tender shut or cut off the view of plaintiff's intestate from the approaching engine, the absence of the headlight would not be the proximate cause of the injury, or one of the proximate causes of the injury, unless the jury further find from the greater weight of the evidence that if there had been a headlight, such as are in general use on the lead end of the approaching switch engine, that it would have made known the presence of the switch engine to plaintiff's intestate in time for him to have stopped and avoided the injury, the jury will answer the second issue 'No' as to that allegation of negligence."

Fourteenth Assignment of Error.

For refusal of the Court to charge the jury as requested
85 in defendant's tenth request for instructions, which is as follows:

"In this cause it is alleged, among other grounds of negligence, that defendant's lessee did not have a brakeman on the front end of the tender of said engine. If the jury find from the evidence that

defendant's lessee was a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was an employee of defendant's lessee, and was, at the time of the injury complained of, engaged in such interstate commerce, then this action would be triable under the laws of the United States, and the defendant would be entitled to the benefit and protection thereof, and subjected to the liabilities imposed thereby, and if the jury should find from the evidence that plaintiff's intestate suddenly came on track of defendant's railroad from behind the tender of an engine standing still, and was stricken by the said switch engine, backing on an adjacent track, and should further find from the evidence that if a person had been standing on the lead end of the tender as it was backing, he could not have warned plaintiff's intestate not have stopped the engine in time to have avoided the injury, the jury will answer the first issue 'No' as to that allegation of negligence."

Fifteenth Assignment of Error.

For refusal of the Court to give defendant's eleventh prayer for instructions, as follows:

"If the jury find from the evidence in this case that defendant's lessee was a common carrier by railroad, engaged in interstate commerce and that plaintiff's intestate was an employee of the defendant's lessee at the time of the injury complained of, was engaged in interstate commerce, then this case would be triable under the laws
of the United States, especially the Act of Congress approved
86 April 22nd, 1908, and the defendant would be liable to the
penalties there in imposed and entitled to the benefit and protection therein given, and if the jury find from the evidence that plaintiff's intestate suddenly came upon one of the tracks of defendant's railroad, leased as aforesaid, from behind the tender of an engine that was standing upon an adjacent track, and was stricken by a switch engine, moving backward, with no one on the front or leading end of the tender, then the jury will, as to the allegation of negligence, that there was no one on the lead end of the tender, answer the first issue 'No.'

Sixteenth Assignment of Error.

For refusal of the Court to give defendant's twelfth prayer for instructions, which is as follows:

"If the jury find from the evidence that an engine was standing on one of the side tracks of defendant company, heading west, with the tender to the east, and if the jury further find from the evidence that plaintiff's intestate walked from behind the tender of the switch engine, standing on said side track to and upon the main line of defendant, upon which a switch engine was moving, and if the jury find from the evidence that the engineer in charge of the said engine was looking back from his cab in the direction in which his switch engine was moving and that said engineer saw plaintiff's intestate as soon as he stepped from behind the tender,

standing on the adjoining track, and immediately or as soon as he could, reversed his engine and applied his air brakes in emergency and attempted to stop and failed to do, then the Court charges you as a matter of law that the absence of a man on the front or leading end of the tender would not be the proximate cause of the injury and the jury will, as to that allegation of negligence, answer the first issue 'No.' "

87 *Seventeenth Assignment of Error.*

For refusal of the Court to give defendant's thirteenth prayer for instructions, which is as follows:

"In this cause, among other grounds of negligence, it is alleged that the engineer in charge of the shifting engine, which is alleged to have stricken plaintiff's intestate, was reckless, careless and incompetent and failed to ring the bell and to sound the whistle, as required by the rules of the defendant company. The Court charges you as a matter of law, that there is no evidence that this accident took place at any crossing, and that there is no evidence of any rule of the company, requiring its bell to be rung or its whistle sounded for a movement of this character, and as to that allegation of negligence, upon all the evidence, the jury will answer the first issue 'No.' "

Eighteenth Assignment of Error.

For refusal of the Court to give defendant's fourteenth request for instructions, which is as follows:

"If the jury find from the evidence in this cause and by the greater weight thereof, that on the evening of the 29th day of April, 1909, plaintiff's intestate was in the employ of defendant's lessee as a fireman, and that an engine and tender was standing on a side track of defendant company, next to its main line, and that at the same time a switch engine was backing down the main line eastwardly without a headlight, and without any one on the front end of the tender, and should further find from the evidence, by the greater weight thereof, that the bell was ringing and that the engineer was looking out of his window backward, that is, in the direction in which the engine was moving, and should further find from the evidence, by the greater weight thereof, that plaintiff's
88 intestate stepped from behind the tender of an engine, standing on the side track up on to the main line, within a distance of about six feet of the moving switch engine, and that the engineer in charge of the switch engine saw plaintiff's intestate as soon as he stepped from behind the tender of the engine standing on the side track and before he stepped on the main line and immediately reversed his engine and applied his airbrake in emergency and stopped his engine as soon as he could, and plaintiff's intestate was run over and killed, and if the jury further find from the evidence, plaintiff's intestate could, if he had looked before going upon the main line, have seen the approaching switch engine, the jury will answer the first issue 'No.' "

Nineteenth Assignment of Error.

For refusal of the Court to give defendant's fifteenth prayer for instructions, which is as follows:

"This brings us, gentlemen of the jury, to the question of the second issue, that is, contributory negligence. Upon all the evidence in this case, if the jury believe the same, the jury should answer the second issue 'Yes.'"

Twentieth Assignment of Error.

For refusal of the Court to give defendant's sixteenth assignment of error, which is as follows:

"If the jury find from the evidence that plaintiff's intestate was in the employ of the lessee of defendant company and that on the evening of April 29th, 1909, an engine was standing on a side track adjacent to the main line of defendant company, which engine was headed west and the tender to the east, and if the jury should further find from the evidence, that a switch engine was moving
89 eastwardly along the main line of defendant company's railroad, and that plaintiff's intestate stepped from behind the tender of a switch engine standing on the side track, into the space between the side track and the main line, and then stepped onto the main line in front of a moving switch engine, so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence, plaintiff's intestate could, if he had stopped, looked and listened, or if the jury should further find from the evidence that if plaintiff's intestate had looked in the direction from which said switch engine was coming before stepping onto the main line in front thereof, if he did so step, that then plaintiff's intestate could have seen the approaching switch engine and avoided the injury, plaintiff's intestate would be guilty of contributory negligence, and the jury would thereupon answer the second issue 'Yes.'"

Twenty-first Assignment of Error.

For refusal of the Court to give defendant's seventeenth prayer for instructions, which is as follows:

"If the jury find from the evidence that plaintiff's intestate was in the employ of the lessee of defendant company, and that on the evening of April 29th, 1909, an engine was standing on a side track adjacent to the main line of defendant company, which engine was headed west, and the tender east, and if the jury should further find from the evidence that a switch engine was moving eastwardly along the main line of defendant railroad, and that plaintiff's intestate stepped from behind the tender of an engine standing on the side track into the space between the side track and the main line, and then stepped onto the main line in front of a moving switch engine, so that plaintiff's intestate was stricken and killed, and if the jury should further find from the evidence plaintiff's in-
90 testate could, if he had stopped, looked and listened, or if the jury should further find from the evidence that if plaintiff's

intestate had looked in the direction from which said switch engine was coming before stepping on to the main line in front thereof, if he did so step, that then plaintiff's intestate could have seen the approaching switch engine and avoided the injury, plaintiff's intestate would be guilty of contributory negligence, and this would be true even though the jury should find by the greater weight of the evidence that there was no headlight on the switch engine, and should further find by the greater weight of the evidence that there was no one on the front or leading end of the tender, and the jury would answer the second issue 'Yes.'"

Twenty-second Assignment of Error.

For refusal of the Court to give defendant's eighteenth prayer for instructions, which is as follows:

"It is negligence for a person to go upon or attempt to cross over a railroad track, without looking and listening for approaching trains, and if the jury find from the evidence in this case, by the greater weight thereof, that plaintiff's intestate could, if he had looked and listened for the approaching train, have seen or discovered that the switch engine which struck plaintiff's intestate, if you find from the evidence that he was stricken by a switch engine, and could have avoided the injury, then you will answer the second issue 'Yes.'"

Twenty-third Assignment of Error.

For refusal of the Court to give defendant's nineteenth request for instructions, which is as follows:

"Gentlemen of the jury, if you answer the first issue 'No' you need go no further in this case; if you answer the second issue
91 'Yes,' then you need not consider the case further and answer the third issue, unless you find from the greater weight of the evidence that defendant's lessee was a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was an employee of defendant's lessee, and at the time of the injury complained of, was engaged in such interstate commerce. If, however, you find from the evidence, by the greater weight thereof, that defendant's lessee was a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was an employee of defendant's lessee, and at the time of the injury complained of, engaged in interstate commerce, then you will consider the third issue, even though you find the third issue 'Yes.'"

Twenty-fourth Assignment of Error.

For refusal of the Court to give defendant's twentieth prayer for instructions, which is as follows:

"Upon all the evidence in this case, the Court instructs you as a matter of law, to find the third issue 'Nothing.'"

Twenty-Fifth Assignment of Error.

For the Court erred in the charge to the jury as follows:

"In order to make it the duty of the defendant to have had the headlight there, he must satisfy you that it was dark, sufficiently dark to make it proper to have a headlight. If he has so satisfied you, gentlemen, by the greater weight of the evidence, then you will take that into consideration. If you find that it was dark enough to make it necessary for the protection of the passers along the track, and for the proper movement of the train, that the headlight should have been there, you will take that into consid-
92 sideration. You will determine that question. If you say, 'Yes, it was,' why then, gentlemen, I charge you, upon that finding by you, if you find it, that it was the duty of the railroad company to have had a headlight on the rear of that tender, and that if it had no headlight it would be guilty of negligence by reason of its failure to have. That would be one of the elements of negligence that you would consider.

"Then, gentlemen, if the plaintiff has further satisfied you by the greater weight of the evidence of the failure to have this headlight burning upon the engine, in consequence of its being dark enough to require its presence, and that this failure was the proximate cause of the injury to the plaintiff's intestate, then you would answer that first issue 'Yes.'"

Twenty-Sixth Assignment of Error.

For that the Court erred in charging the jury as follows:

"I further charge you, however, gentlemen, that you may take that into consideration, taken in connection with the conditions which existed there, the presence of this large engine, which was making a noise, if you find it was making a noise; the fact that persons passing over the track there might pass behind the tender of this big engine and have their view of the track obstructed—if you find it was obstructed—as circumstances to be considered by you upon the question as to whether the speed, the position of the big engine, the noise of the engine, the absence of the light, if you find it was absent, the darkness, if you find it was dark, the running of the shifting engine under those circumstances, and with those surroundings, constituted a negligent operation of the shifting engine over the main track.

"Now, if the plaintiff has satisfied you, gentlemen, taking
93 all those circumstances together, that it was conduct which a man of ordinary foresight could foresee was likely to result in injury to some one, why then, that operation would be negligence, and if you should find that the plaintiff's intestate was killed as the proximate cause of such operation, then you should answer the first issue 'Yes.'"

Twenty-Seventh Assignment of Error.

For that the Court erred in charging the jury as follows:

"The plaintiff says that if it was in the night time the defendant ought to have had a headlight there; that if it was in the day time,

running through a yard like that, with six tracks on it, a number of engines and trains of cars, train crews in the yard or likely to be in the yard, that if it was in the day time the defendant ought to have had a flagman on the tender for the purpose of keeping a lookout; that it was its duty to have done this; and if you find, gentlemen, that the injury was inflicted in the day time, when there was light enough to see the movement of the engine and the movement of persons along or across the track, then I charge you, gentlemen, that it was the duty of the defendant to have had a flagman on the rear of that tender, and the failure to have him there would be negligence, unless you further find, gentlemen, that the engineer, from where he was sitting in his engine, could keep this lookout—a proper lookout—upon the track, as he backed his train along it.

"He says that he was in that position, and that he did keep that outlook. If that is so, gentlemen, I do not think under the circumstances of this case, it would have been the duty of the defendant to have had a flagman on the end of the tender, because the engineer could have fully discharged that duty, if you find the facts
94 to be as testified to by him; but if you do not so find, then it was the duty of the defendant to have had the flagman on the tender, and if it failed to have him there—and there is no evidence that he was there—that would be negligence.

"And if you should further find, gentlemen of the jury, that if there had been a flagman there on the lookout, that he could, by the exercise of ordinary care and watchfulness, have discovered that the plaintiff's intestate was either on or about to go on the track, and by giving him proper warning could have prevented the injury, then, if you find, gentlemen, that his absence was the proximate cause of the injury, you would answer the first issue 'Yes.'"

Twenty-Eighth Assignment of Error.

For that the Court erred in charging the jury as follows:

"The measure of damages for the loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditures from his gross income, and then estimating the present value of the accumulation from such net income, based upon his expectation of life."

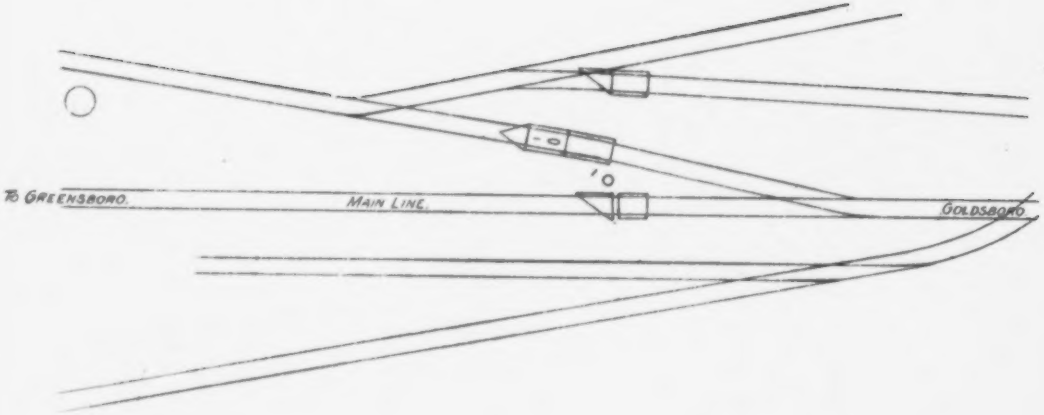
The foregoing is tendered as case on appeal in this cause.

Respectfully submitted,

WM. B. RODMAN,
JOHN K. GRAVES,
WILSON & FERGUSON,
Attorneys for Defendant.

(Here follows diagram marked page 95a.)

95 Endorsed upon the back of the case on appeal appears the following words and figures, to-wit:



95
No. 124

JAS. A. ZACHARY, Administrator of Herbert H. Burgess, Deceased,
VS.
NORTH CAROLINA RAILROAD COMPANY.

Defendant's Case on Appeal.

Service of the within case on appeal accepted and a copy received this March 31st, 1911.

JOHN A. BARRINGER,
Attorney for Plaintiff.

Undertaking on Appeal.

NORTH CAROLINA,
Guilford County:

In the Superior Cou..

JAS. A. ZACHARY, Administrator of H. H. Burgess,
VS.
NORTH CAROLINA RAILROAD COMPANY.

Whereas, at February Term, 1911, of the Superior Court of said County, the plaintiff recovered judgment of the defendant for two thousand ($2,000.00) dollars and costs of this action; and,

Whereas, the defendant intends to appeal from said judgment to the Supreme Court;

Now, therefore, we, the North Carolina Railroad Company,
96 defendant, and Illinois Surety Company, of Chicago, Illinois, undertake pursuant to the statute in the sum of fifty ($50.00) dollars to pay all costs which may be awarded against said defendant on said appeal.

[SEAL.] NORTH CAROLINA RAILROAD CO.,
By WILSON & FERGUSON, *Attorneys.*
ILLINOIS SURETY COMPANY,
By G. S. FERGUSON, JR.,
Attorney in Fact.

Clerk's Certificate.

NORTH CAROLINA,
Guilford County:

I, Jas. W. Forbis, Clerk of the Superior Court, do hereby certify the foregoing and attached to be a true and correct transcript of the record of the case of Jas. A. Zachary, administrator of H. H. Burgess, against the North Carolina Railroad Company, as the same is taken from and compared with the original file in this office.

Witness my hand and official seal this the 7 day of August, 1911.

[L. S.] JAS. W. FORBIS,
Clerk Superior Court.

97 *Docket Entries.*

Appeal docketed August 12, 1911. Argued Oct. 24, 1911. Opinion by Brown, J. handed down November 9, 1911 as follows:

98 Supreme Court of North Carolina, Aug. Term, 1911.

329, Guilford.

JAS. A. ZACHARY, Adm'r of Herbert H. Burgess,
v.
NORTH CAROLINA RAILROAD CO., Appellant.

Civil Action Tried at February Term 1911 of the Superior Court of Guilford County, his Honor Judge Daniels presiding.

The action is brought to recover damages for the negligent killing of Herbert H. Burgess, a fireman in the employment of the Southern Railway Company, the lessee of the defendant, at Selma, N. C., April 29th, 1909.

These issues were submitted to the jury:

1. Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint?

Answer: "Yes."

2. Did the intestate of the plaintiff contribute to his death by his own negligence?

Answer: "No."

3. What amount, if any, is the plaintiff entitled to recover?

Answer: "$2,000.00.

From the judgment rendered defendant appealed.

The facts are sufficiently stated in the opinion of the court.

John A. Barringer: G. S. Bradshaw and T. M. Calvert for plaintiff.

Wilson & Ferguson and John K. Graves for defendant.

BROWN, *J.:*

There are twenty three assignments of error in the record none of them relating to the reception or rejection of evidence. These assignments present for consideration the three principal con-
99 tentions of the defendant.

1. That the Act of Congress of April 22, 1908 known as the Federal Employees Liability Act applies and that the cause should have been determined under the provisions of that Act.

2. That there is no sufficient evidence of negligence.

3. That in any view of the evidence the intestate was guilty of such contributory negligence as under the law of this State bars recovery.

Does the Federal Act apply?

Plaintiff's intestate was fireman of engine 862 which was standing at the time of the occurrence on the cinder tract at Selma, N. C. He had been oiling his engine and preparing it to take a train from

Selma to Greensboro, which was made up at Selma. He started across the tracks to go to his boarding house before leaving and was stricken and killed by a local switch engine, which at the time was backing down the main line for the purpose of cutting out two cars, which had come in from Pinners Point, Va. on train 72 for transportation to Greensboro, N. C. Train 72 is known as the Pinners Point Train via Selma to Goldsboro, N. C.

Engine 862 was not attached to any cars at the time, but was being prepared to haul a train from Selma to Greensboro composed of miscellaneous cars. All cars brought in from Pinners Point Va. by train 72 for point- West of Selma are included in this train.

We are of opinion that the Federal Act does not apply and that the case was properly tried under the State Law.

The Act applies only to a carrier by railroad while engaging in interstate commerce, and only to an employee "suffering in-
100 jury while he is employed by such carrier in such commerce."

The point was not discussed on the argument or in the briefs but it occurs to us that the North Carolina Railroad is not an interstate railroad, nor is that corporation itself engaged in interstate commerce.

Its tracks and property lie wholly within the State of North Carolina extending from Goldsboro to Charlotte. It is true the tracks and property are leased to the Southern Railway Co., a corporation of another State, that is engaged in both inter and intra State Commerce, but that does not necessarily make the North Carolina Railroad Company an interstate carrier within the meaning of the Act of Congress any more than A would be made a wholesale grocery merchant because he had leased his warehouse to B who conducted such business in it, and had assumed responsibility for B's debts.

The corporation known as the North Carolina Railroad Company is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company and distributes them among its stockholders, but it is not an interstate carrier within the meaning of the Federal Act.

It is also true that this Court has held in Logan v. Railroad 116 N. C., 941 that this lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business on the lessor's road, it matters not what kind of commerce the lessee is engaged in at the time. But that is because a railroad corporation can not escape its responsibility by leasing its road. It is still liable for its lessee's acts, of commission and omission whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.

We do not think the Federal Act applies for the reason that
101 the deceased at the time when killed was not employed by the Southern Railway, the lessee, in interstate commerce. At the time he was killed the deceased was not engaged in an act of any kind of commerce. He was on way to his boarding house for a purpose entirely personal to himself and not on the carrier's business. The deceased had oiled and prepared his engine to make the run

from Selma to Greensboro, points within this State. The engine was stationary and had not been attached to any cars. The deceased was on his way to his boarding house and was killed by a local switch engine which was then unattached to any cars but going for two cars from Pinners Point Va. for the purpose of attaching them to the train that engine 862 was expected to pull. So far as the evidence shows the deceased nor his engine had ever been engaged in any other work except this local run from Selma to Greensboro.

If the contention of the defendant can be maintained then it follows that all employees of railways that do an interstate business are necessarily employed in interstate commerce.

The ticket seller, who sells a ticket to a traveller going beyond the State, the care cleaner who cleans the car he is to travel in, the man who loads the engine tender with coal which is to pull him and the gate keeper who examines his ticket and passes him on to his car, are all employed in interstate commerce.

The Employees Liability Act of 1906 was declared repugnant to the Constitution because by its terms it embraced all employees of a railroad, interstate and intrastate and that the two were so interblended in the statute that they were incapable of separation. Employers' Liability cases 207 U. S. 463.

If the contention of the learned counsel for defendant be well founded then the subsequent Act of 1908 would apply to all
102 employees of a railway engaged in both kinds of commerce, however, remotely they are connected with it.

This would accomplish the very end which it would seem could not be accomplished by the Federal Congress under the first Act.

This contention would extend the power of Congress to almost every conceivable subject of railway transportation, however, inherently local and would destroy the authority of the States over matters which from the beginning have been under their control.

Was the evidence of negligence sufficient to justify the Court in submitting the matter to the jury? We think it was. The evidence offered by plaintiff tends to prove that the deceased was compelled to cross the several tracks of the railroad to go from his engine to his residence; that it was customary for all employees to pass to and fro over these tracks; that it was dark at the time and the switching engine was running backwards, tender foremost, from 15 to 20 miles an hour. The witnesses testify that there was no light whatever on the end of the tender that was moving forward, nor any flagman there. This is ample evidence of negligence to go to the jury. Ray v. Railroad, 141 N. C., 84; Smith v. Railroad 132 N. C. 819; Purnell v. Railroad 122 N. C. 832.

Was the plaintiff's intestate, in any view of the evidence guilty of such contributory negligence as bars recovery?

We think not and that his Honor properly submitted that matter to the consideration of the jury. Had it appeared from the evidence offered by plaintiff that his intestate was guilty of contributory negligence, it is settled by precedents that the court may sustain the motion to non suit or direct a verdict upon that issue. Baker v. Railroad 150 N. C., 562; Strickland v. Railroad 150 N. C. 4.

Under the conditions surrounding the intestate we can not say, as matter of law, that in any view of the evidence he was guilty of contributory negligence. His Honor properly submitted the
103 matter to the jury under which is commonly known as the rule of the prudent man. There is strong evidence of contributory negligence, but the evidence is not all of that character from which only one inference can be drawn.

If nothing appeared in evidence except the testimony of Oliver, the engineer of the switching engine that killed the intestate, it may be that the Court might well have sustained the defendant's contention. But there are many facts and circumstances in evidence which tend to exculpate the intestate and to explain his conduct. The intestate was evidently in a hurry to go to his residence and return to his engine; he was compelled to cross six tracks; there was no other way; it was the universal custom for the employees to cross these tracks passing to and fro from their places of residence on the south side; the big freight engine 719 was standing on a tract about eight feet from main line with its blower on making a very loud noise, so that the bell of the switching engine could not be heard by the intestate, who at the time came from behind No. 719 and started to step on main track and was killed by the switch engine. The engineer of that engine says that the intestate did not look and that if he had looked he could have seen the switch engine. That is the construction put by the engineer upon the interstate's conduct from the engineer's point of view, but under all the circumstances taking the evidence as a whole, it ought to be held to be conclusive. The intestate could not well hear the ringing bell or the approach of the switch engine because of the blowing off of 719. It was dark and possibly he could not see the switch engine. He had the right to rely upon the invariable requirements that an approaching engine will display a head light at night. Had there been a head light he would probably have seen it before he stepped upon the track. The absence of it may have misled him, and lured him to his death.
104 While an employee must exercise reasonable care, the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply in all its strictness to one who — employed in a railroad yard and whose duties make it necessary for him to go frequently upon the tracks. Wolf v. Railroad 54 N. C., 571; Sherrill v. Railroad 140 N. C. 255; Weiss v. Bethlem Iron Company, 88 Fed. Rep., 23; St. Louis, &c., R. Co. v. Jackson, 78 Ark., 100; 93 S. W., 746; Baltimore &c. R. Co. v. Peterson, 156 Ind., 364; Shoner v. Pennsylvania Co., 130 Ind., 170; McMarshall v. Chicago &c. R. Co., 80 Iowa 757; Jordan v. Chicago &c. R. Co., 58 Minn., 8.

It is well said by Mr. Justice Manning in his clear and well considered opinion in Farris v. Southern Ry. 151 N. C., 483: "While we are in nowise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well considered decisions of this and other courts, yet 'it cannot always be said that he is guilty of contributory negligence as a matter of law, because he

did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well' (3 Elliott on Railroads, Sec. 1166*a*) or that he failed to look in opposite directions at the same moment of time."

Taking into consideration the whole evidence, and weighing the conditions and circumstances surrounding the intestate we are of opinion that his Honor properly submitted the question of contributory negligence to the jury and overruled the motion of non suit.

The charge is full and clear presentation of both sides of
105 the controversy and we find no error in it of which the defendant can justly complain.

No error.

106 JAMES A. ZACHARY, Adm'r,
v.
NORTH CAROLINA RAILROAD CO.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County: Upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of the said Superior Court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Geo. H. Brown, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of Twenty-three 05/100 Dollars ($23.05) and execution issue therefor.

Supreme Court of North Carolina.

I, Thos. S. Kenan, Clerk of the Supreme Court of North Carolina, do hereby certify that the foregoing is a full, true and perfect copy of the record in the case of Jas. A. Zachary, Adm'r against North Carolina Railroad Co. as appears from original in said case, on file in this court. Given under my hand and seal of said court at office in Raleigh this twelfth day of December, A. D. 1911.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 22,974. North Carolina Supreme Court. Term No. 144. North Carolina Railroad Company, plaintiff in error, vs. James A. Zachary, administrator of Herbert H. Burgess. Filed December 21st, 1911. File No. 22,974.

12

Office Supreme Court, U. S.
FILED
DEC 15 1913
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 144.

NORTH CAROLINA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES A. ZACHARY, ADMINISTRATOR OF HERBERT H. BURGESS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

WILSON & FERGUSON,
JOHN K. GRAVES,
Attorneys for Plaintiff in Error.

INDEX.

	Page
Statement	1
Assignment of errors	4
Argument	6
Does the Federal act apply?	6
Situation just prior to accident	9
Situation at moment of accident	12
Is the situation affected by the fact that the lessor and not the lessee operating the road is sued?	22

TABLE OF CASES CITED.

Boldt *vs.* New York, etc., R. Co., 18 N. Y., 432	19
Colasurdo *vs.* Central R. R. of N. J., 180 Fed., 832	8,26
Employers' Liability Cases, 207 U. S., 463	26
Ewald *vs.* Chicago, etc., R. Co., 70 Wis., 420; 36 N.W., 12	19
Freeman *vs.* Powell (Tex.), 144 S. W., 1033	11
Gulf, etc., Ry. Co. *vs.* McGinnis, 228 U. S., 173	7
Horton *vs.* Oregon, etc., R. Co. (Wash.), 130 Pac., 897	10,11
Johnson *vs.* Southern Pacific Co., 196 U. S., 1	9,10
Kansas City, etc., Ry. Co. *vs.* Pope (Tex.), 152 S. W., 185	11
Kirk *vs.* Ry. Co., 94 N. C., 625	23
Kitchenham *vs.* Owners of S. S. *Johannesburg*, Law Reports, App. Cases, 1911, p. 417	17
Lamphere *vs.* Oregon, etc., R. Co., 196 Fed., 336	10,15,16
Logan *vs.* North Carolina R. Co., 116 N. C., 941	27
Michigan Central R. Co. *vs.* Vreeland, 227 U. S., 59	7
Missouri, etc., R. Co. *vs.* United States, 221 U. S., 112	15,20
Mondou *vs.* New York, etc., R. Co., 223 U. S., 1	15
Montgomery *vs.* Southern Pacific Co. (Ore.), 131 Pac., 507	11
Neil *vs.* Idaho, etc., R. Co. (Idaho), 125 Pac., 331	11
Northern Pacific R. Co. *vs.* Maerkl, 198 Fed., 1	9
Pedersen *vs.* Delaware, etc., R. Co., 229 U. S., 146	8,9,16
Philadelphia, etc., R. Co. *vs.* Tucker, 35 App. D. C., 123	17
St. Louis, etc., Ry. Co. *vs.* Seale, 229 U. S., 156	11
The Employers' Liability Cases, 207 U. S., 463	26
United States *vs.* Atchison, etc., R. Co., 220 U. S., 37	21
United States *vs.* Chicago, etc., Ry. Co., 197 Fed., 624	20
United States *vs.* Denver, etc., R. Co., 197 Fed., 629	21
United States *vs.* Kansas City Southern Ry. Co., 189 Fed., 471	21
United States *vs.* St. Louis, etc., R. Co., 189 Fed., 954	21

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 144.

NORTH CAROLINA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES A. ZACHARY, ADMINISTRATOR OF HERBERT H. BURGESS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This was a civil action, instituted in the Superior Court of Guilford County, North Carolina, to recover damages for the death of defendant in error's intestate, Herbert H. Burgess, which was alleged to have been caused by the wrongful act and negligence of plaintiff in error, North Carolina Railroad Company, and its lessee, Southern Railway Company.

Judgment was rendered in said court in favor of the plaintiff for $2,000, with interest and costs, which judgment was affirmed by the Supreme Court of North Carolina (for opinion, 156 N. C., 496, see Trans., p. 64).

The case is brought here by the North Carolina Railroad Company, claiming that said judgment is inconsistent with the provisions of the act of Congress entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, enacted in pursuance of article I, section 8, clause 3, of the Constitution of the United States, and that said judgment deprives the plaintiff in error of rights, privileges, and immunities to which it is entitled under said article of the Constitution and the provisions of said act.

The North Carolina courts held the Federal act inapplicable, whereas plaintiff in error claims that it applies and that the judgment rendered under State law operates as a denial of rights under the Federal act.

The facts disclosed by the evidence, so far as material here, are as follows:

On the evening of the 29th day of April, 1909, Herbert H. Burgess, a fireman in the employment of Southern Railway Company, which was operating the railroad of plaintiff in error, North Carolina Railroad Company, under the charter of the latter company, in accordance with the laws of North Carolina, under lease from plaintiff in error,

was engaged in the discharge of his duties as such fireman on engine No. 862, and said intestate, after inspecting, oiling, firing, and preparing said engine for a trip to Spencer, North Carolina, and while crossing the main track in the yards belonging to plaintiff in error, but in possession of Southern Railway Company under said lease, at Selma, North Carolina, was struck and killed by a switching engine which was being moved and operated along said track by employees of said Southern Railway Company (allegations of complaint, Trans., p. 8, admitted by answer, Trans., p. 11).

It appears from the undisputed evidence that prior to and at the time of the accident engine No. 862, of which the deceased was fireman, was standing on the cinder-pit track headed west, this track being 10 or 15 feet north of the main track (Trans., pp. 17, 19). Engine No. 1551, which had been standing at the freight depot, started backing, with tender in front, on the main track in an easterly direction, and just as it came opposite to engine No. 719, standing on the track between the cinder-pit track and the main-line track, struck the deceased, who came from behind engine No. 719, hurrying along toward the south from the direction in which engine No. 862 was standing north of the main track, and stepping upon the main track 5 or 6 feet ahead of the approaching engine (Trans., pp. 27, 31). A rough sketch of the situation, referred to by witness Noble Price on page 18 of the record, will be found in the transcript inserted between

pages 62 and 63 (north is in the direction of page 62). Deceased was found lying on the south rail—the far rail from the direction from which he came upon the track—his head on the outside of the rails and his feet between the rails (Trans., pp. 20, 24).

As shown by the undisputed evidence, engine 1551 was at the time of the accident moving over for the purpose of cutting, or detaching, cars, destined to Selma and Goldsboro, N. C., from train 72, which had come from Spencer, N. C., and was being made up to carry (with a changed engine) "through" cars to Pinners Pont, Va.; *i. e.,* No. 1551 was going over to "work" that train (Noble Price, Trans., p. 19; Oliver, p. 23). Engine 862, upon which the deceased was employed, was being prepared by its crew to haul on through to Greensboro, N. C., and other points a train made up at Selma, which included cars which had come in from Pinners Point, Va. (Noble Price, Trans., p. 20; Oliver, p. 24).

Assignment of Errors.

(Transcript, pages 2 and 3.)

"1. The Supreme Court of North Carolina erred in holding that the act of Congress, entitled 'An act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April 22, 1908, enacted by Congress in pursuance of the power conferred upon and vested in it by article I, section 8, clause 3, of the Con-

stitution of the United States, the benefit and protection of which said clause of the Constitution and said act of Congress were duly set up and specially claimed in these proceedings, did not govern the rights and remedies of the defendant in error and the rights and liabilities of plaintiff in error, North Carolina Railroad Company, with respect to the matters and things out of which this action arose to the exclusion of the statute of the State under which the judgment was had; inasmuch as the record showed that Southern Railway Company, upon the alleged acts and defaults of which the action was based and for which said alleged acts and defaults the judgment was rendered, was, at the time of the injury and death of plaintiff's intestate, a common carrier by railroad engaged in commerce between the States, and that plaintiff's intestate was, at the time of said injury, employed by said Southern Railway Company in such interstate commerce.

"2. Said court erred in holding that the North Carolina statute giving a right of action for wrongful death was applicable to the matters and things upon which this action was based, notwithstanding said act of Congress of April 22, 1908, the benefit and protection of which were duly and specially claimed.

"3. Said court erred in denying plaintiff in error, North Carolina Railroad Company, the right, privilege, and immunity of being governed in respect to said injury and death and of having its liability therefor determined solely by the provisions of said act of Congress, approved April 22, 1908, and thus

erred in denying said plaintiff in error rights, privileges and immunities granted to it by said act of Congress, which said rights, privileges, and immunities were duly set up and specially claimed in these proceedings.

"4. Said court erred in affirming the judgment of the lower court and in so doing denied plaintiff in error the benefit and protection of said act of Congress, approved April 22, 1908, in that the record contained neither allegation nor evidence of the existence of any beneficiary or beneficiaries designated in said act of Congress, in the absence of which said allegations and evidence as to the existence of such beneficiaries there could lawfully be no judgment against plaintiff in error based on the matters and things complained of in this action.

"5. Said court, therefore, erred in rendering the final judgment it did render against the plaintiff in error, and which is complained of in this case."

ARGUMENT.

Does the Federal Act Apply?

The only question presented in this case which might be thought not to be altogether foreclosed by the decisions of this court is whether or not the Federal act applies. If it does, the judgment must be reversed for the reasons stated in the fourth assignment of error, viz., that the record discloses neither allegation nor proof of the existence of any beneficiary or beneficiaries designated in the Federal act.

Michigan Central Railroad Company *vs.* Vreeland, 227 U. S., 59.
Gulf, &c., Ry. Co. *vs.* McGinnis, 228 U. S., 173.

Section 1 of the act is, for ready reference, excerpted in the margin. The act is printed in full in the appendix.

The question was raised in a timely way in the answer (Trans., p. 12), by motion for judgment of nonsuit (Trans., p. 29) and in requests for instructions, and the point was duly preserved by exceptions and assignment of error.

The judgment of the Supreme Court of North Carolina affirming the lower court rests on the proposition that the deceased did not suffer injury or death while employed in interstate commerce by a carrier engaging at the time in interstate commerce. (See Trans., p. 64, for opinion of the court.)

The question of the applicability of the Federal act narrows itself into the question whether the

---

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed works, boats, wharves, or other equipment."

deceased at the time he was struck was employed in interstate commerce. If he was so employed at that time, the railroad company must have been engaged in interstate commerce *through him.* Colasurdo *vs.* Central R. R. Co. of N. J., 180 Fed., 832. If not, the act does not apply, for it is necessary to its applicability that the employee should have been so employed at the time of injury. Therefore, while the record shows (Trans., pp. 19, 23; *ante,* p. 4) that the engine that struck the deceased and the crew operating it were engaged in interstate commerce, we will not stop to discuss that feature. See Pedersen *vs.* Delaware, L. & W. R. Co., 229 U. S., 146 (to the effect that it is not essential that the coemployee whose negligence caused the injury be engaged in interstate commerce).

Coming now to the status of the deceased, we find that he at the time he was struck was crossing the main track in the Southern Railway yards (leased to Southern Ry. Co. by plaintiff in error) (Trans., pp. 8, 23). It further appears that immediately prior to the accident he was firing, oiling, and otherwise preparing his engine (No. 862) for service (complaint, par. 5, Trans., p. 8; answer, par. 5, Trans., p. 11; Witness Noble Price, p. 20). Let us consider the situation as of the time when he was *on the engine* engaged in the duties mentioned.

Situation Just Prior to Accident.

Engine No. 862 was standing on the cinder-pit track being made ready, as we have seen (p. 4), to draw a train which had been or was being made up to carry cars which had come from Pinners Point, Va., on through to destination at Greensboro, N. C., and other points (Trans., pp. 19-20, 24). The testimony clearly shows that the cars were in the course of a through interstate journey, and the natural inference from the testimony is that some, at least, of the cars were loaded with interstate freight, though that feature is immaterial, the cars being employed in interstate commerce regardless of whether they were loaded or empty.

Johnson *vs.* Southern Pac. Co., 196 U. S., 1, 21.

Northern Pac. Ry. Co. *vs.* Maerkl (C. C. A.), 198 Fed., 1.

Pedersen *vs.* Delaware, &c., R. Co., 229 U. S., 146.

Was the preparation of the engine for the purpose indicated, which purpose was about to be carried out, an interstate service, and was the fireman while engaged in that service employed in interstate commerce? Apply the test declared by this court to be the proper one in Pedersen *vs.* Delaware, L. & W. R. Co., 229 U. S., 146 (where an iron-worker carrying from a tool car to a bridge, over which both interstate and intrastate commerce regularly passed, bolts to be used that night or

next morning in the repair of the bridge was held to be employed in interstate commerce):

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" (p. 152).

The court adds:

> "The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See Lamphere *vs.* Oregon R. & Navigation Co., 196 Fed. Rep., 336; Horton *vs.* Oregon, &c., Co., 130 Pac. Rep., 897; Johnson *vs.* Southern Pacific Co., 196 U. S., 1, 21."

Apply also the test suggested in the Lamphere case (C. C. A., 9th Cir.), cited by this court as appears above, where a fireman while on his way to relieve the crew of an interstate train was run over by the negligence of the crew of another train:

> "As indicated in the opinion the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, what is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce?"

In St. Louis, &c., Ry. Co. *vs.* Seale, 229 U. S., 156, the act was held to apply to fatal injury to a yard clerk who, when killed, was on his way to meet an incoming train carrying interstate commerce, his duty being to check the cars.

See:

Neil *vs.* Idaho, &c., R. Co. (Idaho), 125 Pac., 331, 336 (where the conductor of a freight train, standing on a side track preparatory to service in interstate commerce, was struck while walking along another track inspecting his train).

Horton *vs.* Oregon, &c., Co. (Wash.), 130 Pac., 897 (where a pumper at a pumping station for locomotives used in both intrastate and interstate commerce was struck by a train while on his way to work).

Freeman *vs.* Powell (Texas), 144 S. W., 1033 (where the employee was injured while lifting a block of ice for the purpose of carrying same to cars containing interstate passengers).

Montgomery *vs.* Southern Pacific Co. (Oregon), 131 Pac., 507 (switchman injured while engaged in moving a car containing oil to be used on locomotives handling interstate commerce).

Kansas City, &c., Ry. Co. *vs.* Pope (Texas), 152 S. W., 185 (where engineer was killed while "spotting" cars, which he had brought from another State).

These decisions compel an affirmative answer to the question whether the defendant in error's intestate was employed in interstate commerce while on the engine preparing it for its interstate service, which was about to begin.

Now, let us inquire as to the situation at the exact moment of the accident.

Situation at Moment of Accident.

The complaint alleges (paragraph 5) that on the 29th day of April, 1909, "plaintiff's intestate was in the employment of the lessee of the defendant in the capacity of fireman under contract for a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862, in charge of Engineer Cyrus Lawson; that about 8 o'clock p. m. on the date aforesaid, said intestate, after inspecting, oiling, firing, and preparing his said engine, which was standing on a side track on the east side of the main line for starting on its return trip to Spencer, N. C., attempted to cross the main line or track and intervening tracks which were between his said engine and his boarding house, located on the west side, and a few steps from the main track" (Trans., p. 8), and, after allegations designed to indicate negligence on the part of Southern Railway Company and due care on the part of said intestate, that "just as said intestate emerged or stepped from the track in the rear of engine No. 716 [719], and attempted to step upon the edge of the main line

in an attempt to cross it, he was suddenly and violently struck and knocked down by said shifting engine on said main track and so crushed, mangled, mashed, and injured that he died almost instantly."

Paragraph 5 of the answer filed by defendant (Trans., p. 11) admits "that on the 29th day of April, 1909, plaintiff's intestate was in the employment of the lessee of the defendant in the capacity of fireman under contract for a valuable consideration, and on the evening of said day was engaged in the discharge of the duties of fireman on engine No. 862."

It is submitted, then, that the pleadings establish the status of the deceased as employed in his duties as fireman of engine No. 862 at the time of the accident, especially when it is observed that the action is brought and sought to be maintained under the so-called "Fellow-servant Act" of North Carolina (section 2646 of the North Carolina Revisal of 1908), which provides for the recovery of damages by an employee of any railroad injured or killed *"in the course of his services or employment"* by the negligence of any other servant, etc. The complaint (par. 7, Trans., pp. 9 and 10), it will be noted, charges negligence on the part of a fellow-servant—the engineer of the switching engine which struck and killed the deceased.

There is nothing in the evidence tending in any way to throw a different light upon the status of the deceased at the time of the accident. The com-

plaint (par. 5, Trans., p. 8) states that at the time of the accident the deceased was crossing the track to reach his boarding house, which was "located on the west side and a few steps from the main track." The answer denies this allegation (Trans., p. 11). There is no evidence of the purpose of the deceased in crossing the track. It is true that the North Carolina Supreme Court states in its opinion (Trans., p. 65):

> "He was on way to his boarding house for a purpose entirely personal to himself and not on the carrier's business."

but there is no evidence to support this statement.

The witness Oliver testified (Trans., p. 23):

> "I know where his boarding house was, and he was going in that direction."

Doubtless the statement of the court was based on the allegation of the complaint and this statement of the witness Oliver, but an examination of the record shows that there is absolutely no evidence of the deceased's purpose in leaving his engine and crossing the yards. He may have been going to his boarding house or he may not. The mere fact that his boarding house was in that direction proves nothing with respect to where the deceased was going or what his purpose was in going in the direction he took.

In this state of the record it is clear that if the deceased was on duty at the time of the accident

such duty must be assigned to his employment as fireman on No. 862, which was being prepared for a movement in interstate commerce. If on duty, then, he was employed in interstate commerce. He had come on duty; he had begun his work for his employer; he was on the master's premises; he was about to start out on the engine in the performance of his duty. If we apply the test which the Circuit Court of Appeals, in the Lamphere case, deduced from the expressions of this court in Mondou *vs.* New York, etc., R. Co. (223 U. S., 1; see *ante,* p. 10), it is found that the killing of the deceased while he was crossing the track directly hindered and delayed interstate commerce, and as certainly and immediately as if he had stayed on the engine preparing it for its run. Can there be any doubt that Congress in legislating for the safety of interstate commerce and those employed in it intended the act to apply in such a case?

The deceased's status as a servant on duty had been established. What circumstance is present upon which can be founded an argument that this status had been broken or had ceased? When, in firing his engine, he paused, did he then go off duty? When a fireman, having filled his fire-box with coal, rests on his shovel, waiting until further coal is necessary, is there a break in his employment in the service of his master? See Missouri, &c., R. Co. *vs.* U. S., *infra,* p. 20, where Mr. Justice Holmes speaks of the duty "to stand and wait." Did the

status terminate when the deceased stepped from his engine? Did the company then cease to owe him the duty a master owes his servant in the course of the employment?

In the Lamphere case, hereinbefore alluded to, the court asked:

> "Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the States in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury?"

What was there inconsistent with the continued existence of the status in the fact that he descended from the engine and started across the yards? He may have been going to get some necessary tool or he may have been going to his boarding house for a lunch. If the former supposition be indulged, we have the exact situation which existed in the Pedersen case, *supra*. But in either case he was on duty. Even if it be assumed that in the latter case he would not have been on duty, how can mere conjecture change an established status? Will not his status at the time he was struck take color from the acts we know he had been performing a few feet away im-

mediately prior to the accident? Add to the situation the fact that he was about to go out on the engine. If it be assumed that he was, at the moment of the accident, on an errand purely personal to himself, it does not affect the situation. Will a momentary turning aside from the actual physical performance of duty in which a servant is engaged—such, for example, as pausing to take a drink of water—terminate for that moment the status of a servant as employed on his master's business? Can such a narrow view obtain?

Let us briefly refer to a few cases throwing light upon the question under discussion.

In Kitchenham *vs.* Owners of S. S. *Johannesburg,* Law Reports, App. Cases, 1911, p. 417, the question was whether the British Compensation Act applied to a case where a sailor fell into the water in returning to his ship from leave, and Lord Chancellor Loreburn said for the court:

> "We are to say first whether the accident was in the course of the employment. I think it was. The return of this man to his ship was in the course of his employment."

The reasoning in Philadelphia, etc., R. Co. *vs.* Tucker, 35 App. D. C., 123, is pertinent. There plaintiff brought suit under the Federal Employers' Liability Act of 1906 for injuries received by the plaintiff's intestate as he was crossing the defendant's tracks on his way to assume his duties as fireman. The defendant railroad company urged

that at the time of the accident the plaintiff's intestate "was not on duty, was not in the actual service of defendant, and was not employed within the contemplation of the Employers' Liability Act of 1906," but the court overruled this contention, saying (pp. 139-140):

> "When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his

> employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the annex, which was only another agency provided by the master for the accommodation of its servants."

In Ewald *vs.* Chicago, etc., R. Co., 70 Wis., 420, 36 N. W., 12, 14, an action for personal injury, it was held that an engine wiper employed in defendant's round-house while going to his work along a pathway crossing defendant's right of way was an employee of the defendant, the court saying that plaintiff, while passing along the pathway, was an employee "as much as while actually laboring for the company in the round-house, and as much within his contract of employment."

In Boldt *vs.* New York, etc., R. Co., 18 N. Y., 432, plaintiff was injured while walking upon his employer's (defendant's) premises going to his work. The court held that he was an employee at the time, saying:

> "But he was in the defendant's employment and doing that which was essential to enabling him to discharge his particular

> duty, namely, going to the spot where it was to be performed, and he was moreover going on the track where, except as the servant of the company, he had no right to be. He was there as an employee of the company and because he was such an employee."

The idea that a servant is to be deemed "on duty," though he may not at the moment be actively doing anything in the furtherance of the master's work, is well illustrated by the authorities construing the Federal Hours of Service Act. In Missouri, etc., Ry. Co. *vs.* United States, 231 U. S., 112, Mr. Justice Holmes says:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait."

In support of this thought, the court cites United States *vs.* Chicago, etc., Ry. Co., 197 Fed., 624, where it was held that the continuity of service of a train crew was not broken by the one-hour period allowed for dinner, during which period a watchman was placed in charge of the train, nor by a period (which lasted three hours) during which the crew, while waiting for the arrival of a helper,

were at liberty to go to the bunk-house and had no duties to perform.

See also to the same effect:

United States *vs.* Atchison, &c., R. Co., 220 U. S., 37.

United States *vs.* Denver, &c., R. Co., 197 Fed., 629.

United States *vs.* Kansas City Southern Ry. Co., 189 Fed., 471.

United States *vs.* St. Louis, &c., R. Co., 189 Fed., 954.

So, then, even if it be assumed that the deceased was going to his boarding-house on a personal errand, it was a "trifling interruption" (United States *vs.* Atchison, &c., Ry. Co., 220 U. S., 44), which could not change the status of the deceased as "on duty." The engine was being gotten ready to go out (Trans., p. 20), and at the moment the deceased attempted to cross the main track he was subject to be called back to his engine to take his place upon it as fireman. As, then, the deceased was on duty at the time of the accident, and as such duty must be assigned to the character of duty being performed, viz., in interstate commerce, defendant in error's intestate was injured and killed while employed in interstate commerce.

Is the Situation Affected by the Fact that the Lessor and Not the Lessee Operating the Railroad is Sued?

It being apparent, as we submit, that the deceased was killed while employed in interstate commerce by a common carrier by railroad engaged in interstate commerce, the question arises whether the applicability of the Federal act can be affected by the fact that suit was brought and recovery had, not against Southern Railway Company, the lessee of plaintiff in error operating the road, but against the North Carolina Railroad Company, the lessor.

The Supreme Court of North Carolina suggests, rather than decides, as we think, that "the North Carolina Railroad is not an interstate railroad, nor is that corporation itself engaged in interstate commerce" (Trans., p. 65). Let us briefly discuss this question.

It is, of course, for this Court to determine for itself the scope of an act of Congress, and the boundary lines of such act cannot be restricted by the State and its courts by any possible means. If an act of Congress, correctly construed, applies to a particular subject-matter which may be designated "white," the state court cannot make such act inapplicable to "white" by erroneously declaring that "white" is "black." Let us scrutinize the subject-matter here presented with a view to determining whether the aspect it wears under the colors thrown upon it by the state court is the true one, or whether such colors are false.

The action was brought, as we have seen (*ante*, p. 13), under section 2646 of the North Carolina Code, if under any State law, for it charges the defendant, the North Carolina Railroad Company, with actionable negligence quoad the alleged negligence of fellow servants (Kirk *vs.* R. Co., 94 N. C., 625) in operating the switch engine at a reckless rate of speed, in failing to sound proper signals, etc.; and evidence of the alleged negligence of such fellow servants is alluded to by the court (Trans., pp. 66, 67) as justifying the submission of the case to the jury. The section in question of the North Carolina Code gives to the employee (or his representative) of "any railroad *operating* in this state" a right of action against such company for injuries or death suffered in the course of his services or employment with such company. It is plain that the essential and only basis of the action and the recovery had therein was the fact that the plaintiff in error was considered to be a railroad operating in North Carolina and the deceased its employee. The complaint (Par. 7, Trans., pp. 9-10) charges negligence against "the defendant and its lessee" in that "defendant was running said shifting engine" negligently; in that "defendant" did not have a brakeman on the tender, etc. Paragraph 8 of the complaint (Trans., p. 10) alleges that "plaintiff's intestate was killed by the negligence of defendant."

The theory of the case is plainly shown to be that plaintiff in error, through its lessee, was

guilty of actionable negligence. It is the essential basis of the case. Any other supposed theory would be mere subterfuge and would lead to the result that recovery might be had for the same injury from both lessor and lessee; one under the State law, the other under the Federal act.

If there is any liability upon the plaintiff in error quoad the injury to the deceased, it must be predicated upon the acts of its lessee, a common carrier by railroad engaged in interstate commerce. The lessee was operating the property under powers granted to the plaintiff in error to perform the functions of a common carrier. No theory is possible save that the lessor was principal and the lessee the agent and if there be liability upon the principal it is because of acts of the agent. There is no doubt that the agent was engaged in interstate commerce and therefore the principal was through the agent engaging in interstate commerce. It is impossible to assume, as is conceded, that the operation of the road had lawfully been committed to the lessee by the plaintiff in error and accept the decision of the North Carolina court that the lessor was still charged with the obligation of such operation and liability for negligence with respect to it, and avoid the consequence that the principal was engaging in the operation of the road which was in the performance of interstate, as well as intrastate, business. If this proposition is not sound, why might not the defendant in error, assuming, for the sake of the argument, that

his intestate left dependent next of kin, have maintained an action also against Southern Railway Company under the Federal act? Could a recovery be denied him because under the North Carolina law he had recovered damages from the North Carolina Railroad Company on the basis of its responsibility under its charter independently of the liability of its lessee under the law properly applicable to the latter's acts and defaults? If so, the State has succeeded in substituting its statute for the Federal law. If not, we have two recoveries for the same injury suffered by an employee employed in interstate commerce by a common carrier by railroad engaged in interstate commerce.

There can be no doubt that it was the intention of Congress to assume the entire regulation, in the interest of the safe and efficient conduct of interstate transportation by railroad, of the relation of master and servant quoad injuries or death suffered by the employee in interstate commerce. In 1906 it enacted a statute undertaking to take entire control of the relation of master and servant in this respect, so far as railroads engaged in interstate commerce were concerned. In its desire completely to cover the subject-matter it went so far as to endeavor to control the matter of injuries and death suffered by employees of railroads engaged in interstate commerce, not only when the employee was engaged in interstate commerce, but

also when such employee was engaged in purely intrastate commerce. This act was held to be beyond the power of Congress for the reason indicated (Employers' Liability Cases, 207 U. S., 463), and Congress then proceeded as expeditiously as possible to enact the statute involved in this case with a view to narrowing the scope of the act sufficiently, and only sufficiently, to correct the vice which had destroyed the act of 1906. It undertook in the act of 1908 to cover the relation of master and servant with respect to injuries or death suffered by the servant in railroad service when the master and the servant were engaged in interstate commerce. We submit that it is as true to say that Congress intended to go to the limit of its constitutional power quoad every one in fact occupying the position or relation of master with respect to injuries to servants employed in interstate commerce on railroads engaging in interstate commerce as to say that Congress intended to include within the term "person employed in such commerce" all those persons who could be so included within the constitutional power of Congress.

Colasurdo *vs.* Central R. Ro. Co. of N. J., 180 Fed., 832.

This case falls within the scope of the act. We have here the subject-matter—injury to a servant employed in interstate commerce by a common carrier by railroad engaged in interstate com-

merce and the question of liability arising therefrom as between master and servant. The intention of Congress may not be frustrated by the State through legislature or court. The Federal act cannot be evaded and its intent set at naught by technical and specious distinctions. The act will be construed broadly enough to accomplish its intent and this court will look at the substance of the matter and not permit a formula or definition contrived by the State court to rob the Federal act of any of its vigor.

But, even assuming that the North Carolina court would be correct in its suggestion that the plaintiff in error is not itself engaged in interstate commerce if section 1 only of the Federal act is considered (and apparently that section only was in mind), we find that section 7 of the Federal act provides:

> "That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

In the case of Logan *vs.* North Carolina R. Co., 116 N. C., 941, referred to by the court (Trans., p. 65), the decision that "the lessor company is liable for the *torts* of the lessee" is expressly put upon the ground that "the original grant of extraordinary privileges still carries with it a correlative *obligation* to perform *the duties* which were in

contemplation of the State and the corporation when the charter was enacted." (Italics ours.) Under this doctrine, then, the plaintiff in error is "charged with the duty of the management and operation of the business of a common carrier," and so within the Federal act. It will not do to say that, while section 7 establishes the status of the lessor as a common carrier within the meaning of the act, yet it does not militate against the view that it was not engaged in interstate commerce, for it is obvious that, if a common carrier, it was a carrier of interstate commerce, and that section 7 brings within the scope of the act anyone charged with the duty of operating a railroad which is being operated in the performance of the business of interstate commerce. Those charged with the duty (whether actually performing it themselves or not) are liable to employees under and only under the circumstances prescribed in the act.

It is respectfully submitted that the Federal Employers' Liability Act applies to the cause of action presented in this case to the exclusion of the State law, and that the judgment of the North Carolina Supreme Court, which denies to plaintiff in error rights, privileges, and immunities arising under the act of Congress, should be reversed.

WILSON & FERGUSON,
JOHN K. GRAVES,
Attorneys for Plaintiff in Error.

DECEMBER, 1913.

APPENDIX.

Employers' Liability Act of Congress.

Approved April 22, 1908.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal

representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity

that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 144.

NORTH CAROLINA RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES A. ZACHARY, ADMINISTRATOR OF HERBERT H. BURGESS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

The defendant in error, James A. Zachary, administrator of Herbert H. Burgess, brought suit in the Superior Court of Guilford County, State of North Carolina, against the plaintiff in error, North Carolina Railroad Company, to recover damages for the death of the intestate, an employee of the lessee of the plaintiff in error. The defendant in error, plaintiff in the State court, filed a complaint setting up a cause of action against the plaintiff in error under the

State law. The plaintiff in error, defendant in the State court, filed an answer in which it alleged as a further defense to the action that the deceased, at the time he was killed, was engaged in interstate commerce, and that the liability of the company to the defendant in error, as his personal representative, was fixed and regulated by the terms of the act of Congress entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and approved April 22, 1908.

Three issues were submitted to the jury (page 14 of the record):

1. Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant, as alleged in the complaint?

Answer. "Yes."

2. Did the intestate of the plaintiff contribute to his death by his own negligence?

Answer: "No."

3. What amount, if any, is the plaintiff entitled to recover?

Answer: "$2,000.00."

There was evidence tending to show that the deceased was killed on the evening of April 28, 1909, in the yards at Selma, N. C., owned by the plaintiff in error and leased by it to the Southern Railway Company. Some time previously he had been employed by the lessee of the plaintiff in error as an extra fireman, and on the evening of that day he had been engaged in inspecting, oiling, firing and preparing an engine which was to be used in hauling a train from Selma, N. C., to Spencer, N. C. This engine was known as No. 862, and at the time the deceased was doing the work referred to, it was standing on a side track. While the deceased was so engaged, another engine, No. 1551, used as a shifting engine in the yards, was moving about shifting cars and getting together those which were to make up the train to be taken by engine No. 862 from Selma to Spencer.

Engine No. 862 was on a side track on the east side of the main line, and the boarding-house of the deceased was located on the west side, and after the deceased had prepared the engine for taking the trip, he attempted to cross the track to go to his boarding-house for supper, when he was knocked down and killed by engine No. 1551, which at the time was running at a high rate of speed, tender in front, and without light or lookout.

The questions arising on the issues of negligence, contributory negligence, and damages were tried out in the State courts, and the only questions presented to this court by the assignments of error are those which present the exceptions of the plaintiff in error to the refusal of the State court to apply to this case the provisions of the act of Congress entitled "An act relating to the liability of common carriers by railroad to their employees, in certain cases," approved April 22, 1908.

On this aspect of the case, it appears from the testimony, in addition to the facts stated above, that the train which engine No. 862 was being prepared to haul was made up at Selma—that is, that Selma was the starting point—and that its destination was Spencer, N. C. It further appears that, in making up the train at Selma, there were two cars put in that train which had been taken out of another train known as the Pinners Point train (being a place in the State of Virginia). On this matter the witness, Noble Price, testified (page 18 of the Record): "We had started with the shifting engine to remove two cars off ahead of No. 72 before train No. 22 got there." And further: "Our switch engine was backing down the main line for the purpose of cutting two cars off front end of train No. 72. Train No. 72 is what is known as Pinners Point train, from Selma to Goldsboro. It is a train that has through cars. It comes from Spencer, stops at Selma, changes engines, and goes on with that changed engine to Pinners Point, in the State of Virginia. Our switch engine was going down there for the

purpose of taking Selma and Goldsboro cars out of that train. We were going down there to work this Pinners Point train."

The facts in the case will be further referred to in the course of the argument on the particular questions presented by this writ of error.

In support of the judgment of the trial court, and of the decision of the State Supreme Court affirming that judgment, it is respectfully urged:

1. The North Carolina Railroad Company is not a "common carrier by railroad while engaging in commerce between any of the several States."

2. On the pleadings, if there had been any evidence tending to show that the deceased was engaged in interstate service, it would have been the province of the jury to determine that fact.

3. There was not sufficient evidence to submit to the jury the question whether or not the deceased was engaged in interstate commerce.

4. If the plaintiff in error desired to insist on its further defense that the deceased was engaged in interstate commerce, it was its duty to tender an issue on which that fact could properly be inquired into.

ARGUMENT.

1. The North Carolina Railroad Company is not a "common carrier by railroad while engaging in commerce between any of the several States."

The act of Congress declares "that every common carrier by railroad while engaging in commerce between any of the several States shall be liable in damages to any person" under the circumstances and conditions stated in the statute.

It is respectfully urged that the plaintiff in error is not a common carrier by railroad engaging in commerce.

The North Carolina Railroad Company was incorporated by chapter 82 of the Public Laws of 1848-49. The railroad company owns the line of railroad extending from Goldsboro, North Carolina, through Selma and Spencer, to Charlotte, North Carolina. A large part of the stock in this corporation is owned by the State of North Carolina, and a majority of the directors are appointed by the Governor to represent the State's interests. This company, on January 1, 1896, leased its right of way and superstructures to the Southern Railway Company for ninety-nine years at a stipulated rental per annum.

The foregoing facts are matters of public record in the several State departments, principally in the offices of the North Carolina Corporation Commission, and in this case the Supreme Court took judicial notice of these facts.

We offer, respectfully, the following extract from the opinion of the Supreme Court as part of our argument on this point:

> "Its tracks and property lie wholly within the State of North Carolina, extending from Goldsboro to Charlotte. * * * The corporation known as the North Carolina Railroad Company is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company, and

distributes them among its stockholders; but it is not an interstate carrier within the meaning of the Federal act. It is also true that this court has held in Logan *vs.* R. R., 116 N. C., 941, that this lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business on the lessor's road, it matters not what kind of commerce the lessee is engaged in at the time. But that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either."

The plaintiff in error had the right and the opportunity to make its lessee, the Southern Railway Company, a party defendant. The plaintiff in error was represented in the trial court by attorneys regularly employed by the Southern Railway Company as its local attorneys and as division counsel, and also by attorneys representing the general counsel of that company, and had every opportunity to make the Southern Railway Company a party if it had so desired.

2. On the pleadings, if there had been any evidence tending to show that the deceased was engaged in interstate service, it would have been the province of the jury to determine that fact.

It must, of course, be admitted that what constitutes interstate commerce is a question of law, but it is respectfully urged that the question whether a certain employee was, at any particular time, engaged in interstate commerce or an interstate service is a question of fact. There may be many cases in which the facts are admitted, or in which the facts are undisputed and from which no contrary inferences can be drawn; in such cases it would be the province of the court to hold that the employee was engaged in interstate service. But in those cases in which the testimony is conflicting, or in which the testimony is such that, though undisputed,

contrary inferences may be drawn or there may remain the question of the credibility of the witnesses, it remains the province of the jury to find the fact upon the testimony and under the instructions of the court.

As this case was brought in a State court, the court was under the necessity of trying it, as to procedure, in accordance with the mandate of the State statutes and in obedience to the decisions of the Supreme Court of the State on this mode of trial of causes.

> "An issue of law must be tried by the judge or the court, unless it be referred. An issue of fact must be tried by a jury, unless a trial by jury be waived, or a reference be ordered."
>
> Revisal of North Carolina of 1905, section 527.

Under this statute, and following the well-recognized practice in this State, it has been held in many cases that where the evidence is conflicting, or different inferences may properly be drawn from the testimony, it is the duty of the trial judge to submit the questions of fact to the jury.

Marks *vs.* Cotton Mills, 138 N. C., 401;
Ramsbottom *vs.* R. R., 138 N. C., 38;
Stewart *vs.* R. R., 137 N. C., 687.

And it is for the jury to pass upon the credibility which should be given to the testimony of a witness.

Manufacturing Co. *vs.* R. R., 128 N. C., 285;
Halton *vs.* R. R., 127 N. C., 255.

> "It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form."

Cox *vs.* R. R., 123 N. C., 604, as to the burden of proving contributory negligence being on the defendant.

See also Bolden *vs.* R. R., 123 N. C., 614, as to the burden of proving assumption of risk being on the defendant.

The rule has been recognized by this court in Simonton *vs.* Winter, 5 Peters (U. S.), 141, in which it was held that the burden is on the party pleading affirmative matter.

In the case at bar, the plaintiff in error had alleged that the deceased was engaged in interstate commerce, and the burden of proving this was upon it. We maintain in the discussion hereafter, that the plaintiff in error failed to show by any proper evidence that the deceased was engaged in interstate commerce, and that, having made such an allegation, it was the duty of the plaintiff in error, if it wanted to have that question determined, to tender an issue upon which the evidence could be fully developed.

That this question raised an issue of fact to be determined by the jury was in effect admitted by the railroad company on the trial. All the assignments of error in this court must rest upon the refusal of the court to give certain prayers for instruction, and the court will find that each prayer began with a predicate: "If the jury find from the evidence," or "If the jury believe the evidence in this case."

3. There was not sufficient evidence to submit to the jury the question whether or not the deceased was engaged in interstate commerce.

It appears from the part of the testimony of Noble Price referred to in the statement of the case, and other parts of the testimony of the same witness (pages 16 to 21 of the record), that a train, No. 72, had come in from Pinners Point, Va., and other places, and that the shifting crew were working train No. 72 to take out two cars from that train to put them on the train to be made up of those two and other cars, to be hauled from that place to Spencer by the engine which the deceased had been oiling and firing. It appears that the deceased was an extra fireman (page 19 of the rec-

ord), and that he would have gone out on the train being made up if he had not been killed.

As the plaintiff in error raised the question in the answer whether or not the deceased, at the time he was killed, was engaged in interstate commerce, it devolved upon it to show clearly that the deceased was so engaged.

It is respectfully urged that the railroad company did not clearly show that the deceased was engaged in interstate commerce for the following reasons:

a. The evidence does not show that the two cars taken from the Pinners Point train, No. 72, came from the State of Virginia. The testimony is that train No. 72 came from Pinners Point, Va., and that it contained *cars* which came in from Pinners Point "*and other places.*" The evidence fails to show that the two cars taken from that train had come in from Virginia. It may be surmised that those cars came from Virginia, but the evidence does not properly justify an inference that they came from that State; such a conclusion would be nothing more than a guess or conjecture. It is consistent with the testimony to infer that those two cars were put on train No. 72 after that train had entered the State and before it arrived at Selma.

b. The evidence does not show that the two cars taken from train No. 72, and put on the train being made up to be hauled to Spencer, contained any freight. It is just as reasonable to infer on the testimony that they were empty cars. But in view of the answer and the contention of the railroad company that the deceased was engaged in interstate commerce because he had been at work preparing an engine to haul the train being made up, it was incumbent on the railroad company to show that the train, as made up, contained interstate freight. It is respectfully insisted that there is not a word in the record which shows, or even properly tends to show, that fact.

c. At the time he was killed the deceased had left the engine and was going across the main line and the tracks in the yard toward his boarding-house. His then relation to the service had been merely that of getting an engine ready to take the train from Selma to Spencer, and it is surely too remote to argue that because some interstate freight might be put on that intrastate train, that that possible circumstance could be given a reference back to the time he was killed and qualify his relation to the service of the company at that time. His service at the time of his death, it is respectfully submitted, would not be changed to an interstate service by evidence that subsequently interstate freight was put on the train, but in this connection it may be repeated that there is no evidence that any interstate freight was on this train.

The original act of 1906 was held to be invalid because the statute in terms declared that a common carrier engaged in interstate commerce should be liable "to any of its employees," the court holding that the liability under the statute must be limited to employees engaged in such commerce.

The Employers' Liability Cases, 207 U. S., 463.

It is not sufficient that the employee should at times have been engaged in interstate commerce, but the act of 1908 particularly declares that the injury or death must have been caused "while he is employed by such carrier in such commerce."

The prayers for instruction, being predicated on a state of facts upon which there was not sufficient evidence to submit the question to the jury, were properly refused.

Stewart *vs.* Carpet Co., 138 N. C., 60;
Stewart *vs.* R. R., 136 N. C., 385;
Bryan *vs.* R. R., 134 N. C., 538;
Joines *vs.* Johnson, 133 N. C., 487;
Trust Co. *vs.* Benbow, 131 N. C., 413;
Burton *vs.* Mfg. Co., 132 N. C., 17;
Carson *vs.* R. R., 128 N. C., 95.

4. If the plaintiff desired to insist on its further defense that the deceased was engaged in interstate commerce, it was its duty to tender an issue on which that fact could properly be inquired into.

The plaintiff in error, in paragraph 5 of the answer (page 11 of the record), alleged that the train from Selma to Spencer, which was being made up in the yards at Selma, was engaged in transporting and preparing to transport interstate freight, and, in the further defense set up in the answer (page 12 of the record), alleged that the deceased at the time he was killed was engaged in interstate commerce. Having set up these new matters, involving questions of fact, upon which the railroad company might support its contention that the act of Congress should be applied to the case, it was incumbent upon it to tender an issue upon which testimony could be fully developed and rulings might be made thereon with respect to which exceptions could properly be taken.

The Code of Civil Procedure of North Carolina defines issues of law and of fact:

> "An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof."
> Revisal of North Carolina of 1905, section 545.

> "An issue of fact arises—
> "1. Upon a material allegation in the complaint controverted by the answer; or,
> "2. Upon new matter in the answer, controverted by the reply; or,
> "3. Upon new matter in the reply, except an issue of law is joined thereon."
> Revisal of N. C. of 1905, section 546.

> "Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply, shall,

for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

Revisal of N. C., 1905, section 503.

"The issue arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial."

Revisal of N. C. of 1905, section 548.

Under the above statutes, it has been held that if in his pleading a party raises an issue which he deems material, it is his duty to tender an issue upon which the particular question of fact may be properly found and thus made a part of the record. This issue it is the duty of the party to tender, so that the different parties may be advised before the trial begins that testimony upon that issue should be fully presented. If an issue on such matter is not tendered it amounts to a waiver of such question.

Manufacturing Co. *vs.* Cloer, 140 N. C., 128.
Pollock *vs.* Warwick, 104 N. C., 638.
Mining Co. *vs.* Smelting Co., 99 N. C., 445.
Oakley *vs.* Van Noppen, 95 N. C., 60.

"Parties are required to be vigilant and cautious in the prosecution or defense of actions, and when they are not so, particularly in respect to matters they may or may not insist upon, it is too late after the time has passed by to do so, to complain that something was not done, to their supposed disadvantage. It is too late after the trial to complain that possible issues were not submitted to the jury, *if they were not insisted upon before the trial.*"

Simmons *vs.* Mann, 92 N. C., 12.

In Piedmont Wagon Co. *vs.* Byrd, 119 N. C., 460, with respect to an allegation of new matter in the defense in that case, the court said: "This new matter of defense was therefore in litigation upon his allegation, and it was incumbent upon him to tender the proper issue."

On a question raised as a defense, "the defendant carries the laboring oar," and the defense is not open when the defendant tendered no issue.

Womble *vs.* Grocery Co., 135 N. C., 474.

Such parties cannot be heard on appeal to complain that issues submitted do not cover the entire case.

Walker *vs.* Scott, 106 N. C., 56.

In Baltimore, etc., R. Company *vs.* Darr, 204 Fed. Rep., 751, it appears that issues were submitted to the jury on the question whether the defendant was engaged as a common carrier in interstate commerce, and also whether the plaintiff was injured while engaged in interstate commerce.

Respectfully submitted,

JOHN A. BARRINGER,
GEORGE S. BRADSHAW,
THOMAS H. CALVERT,
Attorneys for Defendant in Error.

NORTH CAROLINA RAILROAD COMPANY *v.* ZACHARY, ADMINISTRATOR OF BURGESS.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 144. Argued December 17, 18, 1913.—Decided February 2, 1914.

In order to bring a case within the terms of the Federal Employers' Liability Act of 1908, the defendant must have been, at the time of the occurrence, engaged as a common carrier in interstate commerce and the injured employé must have been employed by such carrier in such commerce.

Where the defendant is a common carrier engaged in interstate commerce and the employé for whose injuries the suit is brought was employed by the defendant in such commerce, the Federal Employers' Liability Act of 1908 governs to the exclusion of the state statutes.

Where the state court improperly refuses to apply the provisions of the Federal Employers' Liability Act in an action for injuries to an employé of a common carrier while both employer and employé were engaged in interstate commerce and the result might have been different, the judgment must be reversed.

The persons related to the deceased employé as specified in the Employers' Liability Act of 1908 are the beneficiaries of an action prescribed by the act and the damages are to be based upon the pecuniary loss sustained by such beneficiaries.

Whether the question of employment by the deceased employé in interstate commerce was properly raised in the state court as a bar to the action in accordance with the local code, is a question of state practice, and if the highest court of the State assumed or decided that the record presented that question and decided it against the party asserting it, this court has jurisdiction to review the judgment under § 237, Judicial Code.

A railroad company, leasing its entire line, which is wholly intrastate, to another railroad company doing an interstate business creates the latter its agent and becomes a common carrier by railroad engaged in interstate commerce; and if under the local law the lessor remains responsible for the lessee's acts, the Employers' Liability Act of 1908

controls as to liability for injuries to employés of the lessee engaged in interstate commerce.

Where, upon the evidence, any essential matter bearing on the question of whether an employé of a railroad company was, at the time of the injury, engaged in interstate commerce is in doubt, it should be submitted to the jury under proper instructions.

Where the state court refused to submit questions to the jury on the ground that there was no evidence to sustain the Federal right asserted, this court will analyze the evidence to the extent necessary to give plaintiff in error the benefit of such Federal right if it was improperly denied. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601.

When a freight train for an intrastate point is being made up of cars including some from a train which started from another State, it is a reasonable inference that such cars were being carried forward as a part of a through movement of interstate commerce.

Hauling empty cars from one State to another is interstate commerce within the meaning of the Employers' Liability Act of 1908.

The Employers' Liability Act is *in pari materia* with the Safety Appliance Act, and this court, following its rulings in regard to the latter, holds that the hauling of empty cars from one State to another is interstate commerce within the meaning of the act. *Johnson* v. *Southern Pacific Co.*, 146 U. S. 1.

Acts of an employé in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce.

Although absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer, a railroad employé may still be on duty and engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908.

156 Nor. Car. 496, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and its application to employés engaged in hauling interstate cars between intrastate points, and also to the owner of an intrastate railroad which it has leased to a common carrier engaged in interstate commerce, are stated in the opinion.

Mr. John K. Graves for plaintiff in error:

As the Federal act applies, the judgment must be re-

versed as the record discloses neither allegation nor proof of the existence of any beneficiary or beneficiaries designated in the Federal act. *Mich. Cent. R. R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173.

The testimony clearly shows that the cars were in the course of a through interstate journey and were therefore employed in interstate commerce regardless of whether they were loaded or empty. *Johnson* v. *Southern Pac. Co.*, 196 U. S. 1, 21; *Nor. Pac. Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1; *Pedersen* v. *Del., L. & W. R. Co.*, 229 U. S. 146.

The preparation of the engine was an interstate service and the fireman while engaged in that service was employed in interstate commerce. *Pedersen* v. *Del., L. & W. R. Co.*, 229 U. S. 146.

For other cases where the act was applied, see *St. Louis &c. Ry. Co.* v. *Seale*, 229 U. S. 156; *Neil* v. *Idaho &c. R. Co.* (Idaho), 125 Pac. Rep. 331, 336; *Horton* v. *Oregon &c. Co.* (Wash.), 130 Pac. Rep. 897; *Freeman* v. *Powell* (Texas), 144 S. W. Rep. 1033; *Montgomery* v. *Southern Pac. Co.* (Oregon), 131 Pac. Rep. 507; *Kansas City &c. Ry. Co.* v. *Pope* (Texas), 152 S. W. Rep. 185.

The pleadings establish the status of the deceased as employed in his duties as fireman at the time of the accident, especially when it is observed that the action is brought and sought to be maintained under the so-called Fellow-servant Act of North Carolina (§ 2646, Nor. Car. Revisal, 1908), which provides for the recovery of damages by an employé of any railroad injured or killed in the course of his services or employment, etc.

Nothing in the evidence tends in any way to throw a different light upon the status of the deceased at the time of the accident. If deceased was on duty at the time of the accident such duty must be assigned to his employment as fireman on an engine which was being prepared for a

movement in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1.

The deceased's status as a servant on duty having been established, this status had not been broken nor had it ceased. *Missouri &c. R. Co.* v. *United States*, 231 U. S. 112; *Kitchenham* v. *S. S. Johannesburg*, L. R. App. Cases, 1911, p. 417; *Philadelphia &c. R. Co.* v. *Tucker*, 35 App. D. C. 123; *Ewald* v. *Chicago &c. R. Co.*, 70 Wisconsin, 420; *Boldt* v. *New York &c. R. Co.*, 18 N. Y. 432; *United States* v. *Chicago &c. Ry. Co.*, 197 Fed. Rep. 624. See also to the same effect: *United States* v. *Atchison &c. R. Co.*, 220 U. S. 37; *United States* v. *Denver &c. R. Co.*, 197 Fed. Rep. 629; *United States* v. *Kansas City Ry. Co.*, 189 Fed. Rep. 471; *United States* v. *St. Louis &c. R. Co.*, 189 Fed. Rep. 954.

The situation is not affected by the fact that the lessor and not the lessee who was operating the railroad is sued.

In enacting the Employers' Liability Act of 1908, Congress undertook to cover the relation of master and servant with respect to injuries or death suffered by the servant in railroad service when the master and the servant were engaged in interstate commerce. Congress intended to go to the limit of its constitutional power as to every one in fact occupying the position or relation of master with respect to injuries to servants employed in interstate commerce on railroads engaging in interstate commerce. *Colasurdo* v. *Central R. R. Co.*, 180 Fed. Rep. 832.

This case falls within the scope of the act.

Even assuming that the state court was correct in its suggestion that the plaintiff in error was not itself engaged in interstate commerce if § 1 only of the Federal act is considered, under § 7 the term "common carrier" includes the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier, and this includes as

lessor the plaintiff in error. *Logan* v. *North Carolina R. Co.*, 116 Nor. Car. 941.

The Federal Employers' Liability Act applies to the cause of action presented in this case to the exclusion of the state law.

Mr. Thomas H. Calvert, with whom *Mr. John A. Barringer* and *Mr. George S. Bradshaw* were on the brief, for defendant in error:

The North Carolina Railroad Co. is not a common carrier by railroad while engaging in commerce between any of the several States. Its tracks and property lie wholly within the State of North Carolina. It is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company, and distributes them among its stockholders; but it is not an interstate carrier within the meaning of the Federal Employers' Liability Act. While *Logan* v. *Railroad Co.*, 116 Nor. Car. 941, has held that this lessor is responsible for all acts of negligence of its lessee, that is because a railroad corporation cannot escape its responsibility by leasing its road.

Plaintiff in error had the right and the opportunity to make its lessee, the Southern Railway Company, a party defendant.

On the pleadings, if there had been any evidence tending to show that the deceased was engaged in interstate service, it would have been the province of the jury to determine that fact.

Under § 527, Revisal of Nor. Car. of 1905, and following the well-recognized practice in this State, it has been held in many cases that where the evidence is conflicting, or different inferences may properly be drawn from the testimony, it is the duty of the trial judge to submit the questions of fact to the jury. *Marks* v. *Cotton Mills*, 138 Nor. Car. 401; *Ramsbottom* v. *Railroad Co.*, 138 Nor. Car. 38; *Stewart* v. *Railroad Co.*, 137 Nor. Car. 687.

And it is for the jury to pass upon the credibility which should be given to the testimony of a witness. *Manufacturing Co.* v. *Railroad Co.*, 128 Nor. Car. 285; *Halton* v. *Railroad Co.*, 127 Nor. Car. 255; *Cox* v. *Railroad Co.*, 123 Nor. Car. 604. See also *Bolden* v. *Railroad Co.*, 123 Nor. Car. 614; *Simonton* v. *Winter*, 5 Pet. 141.

There was not sufficient evidence to submit to the jury the question whether or not the deceased was engaged in interstate commerce.

As the plaintiff in error raised the question in the answer whether or not the deceased, at the time he was killed, was engaged in interstate commerce, it devolved upon it to show clearly that the deceased was so engaged.

At the time he was killed the deceased had left the engine and was going across the main line and the tracks in the yard toward his boarding-house.

His service at the time of his death would not be changed to an interstate service by evidence that subsequently interstate freight was put on the train.

As to why the original act of 1906 was held to be invalid, see *Employers' Liability Cases*, 207 U. S. 463.

It is not sufficient that the employé should at times have been engaged in interstate commerce, but the act of 1908 particularly declares that the injury or death must have been caused while he was employed by such carrier in such commerce.

The prayers for instruction, being predicated on a state of facts upon which there was not sufficient evidence to submit the question to the jury, were properly refused. *Stewart* v. *Carpet Co.*, 138 Nor. Car. 60; *Stewart* v. *Railroad Co.*, 136 Nor. Car. 385; *Bryan* v. *Railroad Co.*, 134 Nor. Car. 538; *Joines* v. *Johnson*, 133 Nor. Car. 487; *Trust Co.* v. *Benbow*, 131 Nor. Car. 413; *Burton* v. *Mfg. Co.*, 132 Nor. Car. 17; *Carson* v. *Railroad Co.*, 128 Nor. Car. 95.

If the plaintiff desired to insist on its further defense that the deceased was engaged in interstate commerce,

it was its duty to tender an issue on which that fact could properly be inquired into. Code of Civ. Proc., Revisal of 1905, §§ 545, 546. And see also Revisal of 1905, §§ 503, 548, as construed in *Manufacturing Co.* v. *Cloer*, 140 Nor. Car. 128; *Pollock* v. *Warwick*, 104 Nor. Car. 638; *Mining Co.* v. *Smelting Co.*, 99 Nor. Car. 445; *Oakley* v. *Van Noppen*, 95 Nor. Car. 60; *Simmons* v. *Mann*, 92 Nor. Car. 12; *Piedmont Wagon Co.* v. *Byrd*, 119 Nor. Car. 460; *Womble* v. *Grocery Co.*, 135 Nor. Car. 474; *Walker* v. *Scott*, 106 Nor. Car. 56; *Baltimore &c. R. Co.* v. *Darr*, 204 Fed. Rep. 751.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the Superior Court of Guilford County, North Carolina, to recover damages for the negligent killing of Burgess, a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred at Selma, North Carolina, on April 29, 1909. Under the local law, as laid down in *Logan* v. *Railroad*, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employés of the lessee, injured through the negligence of the latter.

The complaint set forth in substance that plaintiff's intestate, being in the employ of defendant's lessee, and engaged at the Selma switchyards in the discharge of his duties as fireman upon Engine No. 862, about eight o'clock, p. m., on the date mentioned, after inspecting, oiling, firing, and preparing the engine for starting on a trip from Selma to Spencer, N. C., attempted to cross certain tracks that intervened between the engine and his

boarding-house, which was located a short distance away; that another engine, No. 716, was standing upon a side-track in such position as to shut off intestate's view of the main track; that No. 716 had its blower on, and was making a noise so loud that intestate could not hear a third engine—No. 1551, the shifting engine used in the yards—which at this time was running backward at a reckless and dangerous rate of speed, without headlight and without an adequate and competent crew; and that as intestate stepped from the track in the rear of Engine No. 716 and was about to step upon the main line in the attempt to cross it, he was struck and killed by the shifting engine. Defendant's answer, besides denying the allegations of negligence, set up as a special defense that at the time plaintiff's intestate was killed, he was engaged in interstate commerce as an employé upon a train of defendant's lessee which was moving from Selma, North Carolina, to Spencer, in the same State, and carrying cars loaded with freight from the State of Virginia to the State of North Carolina and other States; that the liability of the defendant to him or to the plaintiff as his representative was fixed and regulated by the Federal Employers' Liability Act of April 22, 1908; and that under that act the plaintiff was not entitled to recover.

Upon the trial, at the close of plaintiff's evidence, which tended generally to support the averments of the complaint, defendant moved for a non-suit, and among other grounds assigned the following:—that from the uncontradicted evidence it appeared that at the time of the occurrence in question defendant, through its lessee, was a common carrier by railroad engaged in interstate commerce, and plaintiff's intestate was at that time a person employed by such carrier in such commerce; that the act of Congress already referred to exclusively regulated the liability of defendant to plaintiff's intestate, and that upon all the evidence plaintiff had failed to make out a

case of liability under that act. The court, in denying the motion, held that the action was brought under the statute of North Carolina, that the Federal act had no application, and that the cause was triable under the statutes of the State. To this ruling, defendant excepted. At the close of the case, defendant again undertook to invoke the protection of the Federal act by requested instructions to the jury, which were refused and exceptions allowed.

There was a verdict for plaintiff and judgment thereon, followed by an appeal to the Supreme Court of the State. That court overruled the contention of defendant that the Federal Employers' Liability Act of April 22, 1908, applied, and held that the action was properly tried under the state law. The result was an affirmance, 156 Nor. Car. 496, and the case comes here under § 709 Rev. Stat. (Jud. Code, § 237).

In order to bring the case within the terms of the Federal act (35 Stat. 65, c. 149, printed in full in 223 U. S., p. 6), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the State. *Second Employers' Liability Cases* (*Mondou* v. *New York &c. Railroad Co.*), 223 U. S. 1, 55; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 158.

It is not disputed that if the provisions of the Federal act had been applied, the result of the action might have been different. To mention only one matter: there was neither averment in the pleadings nor evidence at the trial that deceased left a widow, child, parent, or dependent next of kin. Persons thus related to deceased are the respective beneficiaries of the action prescribed by the act of Congress, and the damages are to be based upon the

pecuniary loss sustained by the beneficiary. *Michigan Central R. R.* v. *Vreeland*, 227 U. S. 59, 68; *Gulf, Colorado &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173. The state law (Revisal 1908, § 2646) seems not to recognise this limitation upon the measure of recovery; certainly the damages in the present case were assessed without regard to it.

In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial court in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of state practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest court of the State either decided or assumed that the record sufficiently presented a question of Federal right and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question. *Home for Incurables* v. *City of New York*, 187 U. S. 155, 157; *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 179; *Haire* v. *Rice*, 204 U. S. 291, 299; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142, 148; *Miedreich* v. *Lauenstein*, decided this day, *ante*, p. 236.

The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad—its tracks and property lying wholly within the State—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in *Logan* v. *Railroad*, 116 Nor. Car. 940, was recognized—indeed reasserted. "But," it was said, "that is because a railroad corporation cannot escape its respon-

sibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." 156 Nor. Car. 500.

It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employés as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a "common carrier by railroad engaging in commerce between the States," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed.

It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed, was not in fact employed by the Southern Railway, the lessee, in interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable; and these will be separately noticed. Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now insisted that there was no evidence tending to show that

deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611, and cases cited.

The evidence tended to show that Train No. 72 of the Southern Railway had come in to Selma, N. C., from Pinners Point, Va., and other places, and that a shifting crew was "working" this train so as to take two cars from it and put them into a train that was to include these and other cars to be hauled from Selma to Spencer, N. C., by Engine No. 862, and that deceased was employed on this engine as fireman for the trip that was about to begin, and had already prepared his engine for the purpose. It is contended that the evidence failed to show that the two cars thus taken from Train No. 72 had come in from Virginia, rather than from the "other places," which it is said might be intermediate North Carolina points. We find, however, evidence that the train which was to be hauled from Selma to Spencer by Engine No. 862, was being made up in part from cars that had come in from Pinners Point; and it was at least a reasonable inference that the two cars referred to were being put into the Spencer train in order to be carried forward as a part of a through movement of interstate commerce.

There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty cars from one State to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in actions based upon the

Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196). *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21; *Voelker* v. *Railway Co.*, 116 Fed. Rep. 867, 873. And the like reason applies, as we think, to actions founded upon the Employers' Liability Act, which, indeed, is *in pari materia* with the other.

It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See *Pederson* v. *Del., Lack. & Western R. Co.*, 229 U. S. 146, 151; *St. Louis & San Francisco Ry.* v. *Seale*, 229 U. S. 156, 161.

Again, it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See *Missouri, Kansas & Texas Ry. Co.* v. *United States*, 231 U. S. 112, 119.

We conclude that with respect to the facts necessary to bring the case within the Federal act, there was evi-

dence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.

From what has been said, it follows that the state courts erred in holding that the Federal act had no application. As the case stands, we are not called upon to determine the validity of the several contentions that were raised by defendant at the trial on the strength of that act, nor to pass upon the mode in which they were raised. Upon these matters, therefore, we express no opinion.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.